THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0267

Appeal of New Hampshire Division of State Police

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

BRIEF FOR THE NEW HAMPSHIRE DIVISION OF STATE POLICE

NEW HAMPSHIRE DIVISION OF STATE POLICE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI
SOLICITOR GENERAL

Jessica A. King
N.H. Bar No. 265366
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3675
Jessica.A.King@doj.nh.gov

(Fifteen-minute oral argument requested)

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TEXT OF RELEVANT AUTHORITIES

RSA 21-I:46 Powers and Duties of Board.

I. The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

(5) The cost of living or related economic factors.

[…]

IX. The board shall issue final decisions on all appeals within 45 days of the date of hearing or upon the receipt of relevant evidence requested by the board as a result of such hearing, whichever is later. If the board determines that it requires additional time for the proper investigation

or determination of the facts or issues involved, it shall notify the employee or employees making the appeal in writing of the reasons for the delay and provide an estimate to such employee or employees of the additional time required.

RSA 21-I:58 Appeals.

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

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

III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall be transferred, and the fee for manifold copies shall be established by the governor and

council and collected by the director of personnel from the party making the appeal. Any fees collected by the director of personnel under the provisions of this section shall be credited to the appropriation for the division of personnel. The appeals board shall not be required to certify the record upon any such appeal, nor shall the appeal be considered until the fees for the copies have been paid.

N.H. Admin. R. **PART Per 1003 REMOVAL FOR NON-DISCIPLINARY REASONS**

Per 1003.01 Purpose. The purpose of this rule shall be to provide for the removal of a full-time employee for non-disciplinary reasons, when:

(a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;

(b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated except by removing the employee from the position;

(c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or

(d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed.

Per 1003.02 Request for Assessment Information.

(a) When an appointing authority believes that, pursuant to Per 1003.01, a full-time employee might need to be removed for non-disciplinary reasons, the appointing authority shall:

(1) Inform the employee in writing that the employee shall be required to provide the appointing authority with a written assessment from the employee's licensed health care practitioner detailing:

a. The employee's general state of health related to performing the essential functions of the position; and

b. The specific nature of any relevant injury, illness, disability or condition which may affect the employee's ability to perform all of the essential functions of the position.

(b) Upon receipt of a written notice as described in Per 1003.02 (a), the employee shall provide the appointing authority with:

(1) The name and address of the employee's licensed health care practitioner; and

(2) A signed statement authorizing the release of assessment information from the licensed health care practitioner to the appointing authority concerning the employee's illness or impairment as that illness or impairment relates to the employee's ability to perform the essential functions of the position.

(c) Upon receipt of a signed release, the appointing authority shall be responsible for providing the following information to the employee and the employee's licensed health care practitioner:

(1) The employee's class specification;

(2) The employee's supplemental job description;

(3) The employee's work schedule;

(4) A written description of the employee's work location; and

(5) A written description of the employee's work environment.

(d) The appointing authority shall inform the employee in writing that failure to comply with the request for a medical assessment

described in Per 1003.02 (b)(2) may result in disciplinary action as provided in Per 1002.

(e) If the appointing authority determines that the information supplied by the employee's licensed health care practitioner is unresponsive to the assessment request, the appointing authority shall arrange to have an independent medical assessment of the employee performed.

(f) When the appointing authority determines that an independent medical exam is necessary, the appointing authority shall:

(1) Bear the full cost of an independent medical assessment performed pursuant to this part;

(2) Ensure that appearance at a scheduled independent medical assessment shall be deemed a work assignment;

(3) Ensure that the employee shall not suffer a loss of pay or leave for the purposes of the assessment; and

(4) Inform the employee that failure to appear at a scheduled independent medical assessment performed pursuant to this part may be considered failure to comply with the legitimate directives of a supervisor and may subject the employee to disciplinary action as provided in Per 1002.

Per 1003.03 <u>Removal</u>.

(a) An appointing authority shall not remove a full-time employee under the provisions of Per 1003 until the appointing authority has obtained medical assessment information indicating that the employee is physically or mentally unable to perform the essential functions of the position.

(b) For the purposes of this part, medical assessment information may be obtained from any of the following sources:

(1) Assessment information obtained through the fulfillment of the requirements specified under Per 1003.02 (a) through (c);

(2) A workers' compensation claim file or determination;

(3) The medical certification required under the Family Medical Leave Act; or

(4) A medical assessment provided in connection with a request from a qualified individual with a disability for a reasonable accommodation.

(c) Prior to removal of a qualified employee with a disability under the provisions of Per 1003, the appointing authority shall determine if any of the following adjustments can be made to allow the employee to avoid removal for non-disciplinary reason(s):

(1) Amend the duties of the position to accommodate the employee's known medical disability, provided, however, that such amendment does not alter the essential duties and responsibilities of the employee's position;

(2) Transfer the employee to a position for which the employee is qualified, with or without reasonable accommodation, which will not require removal under the provisions of Per 1003; or

(3) Demote the employee to a position for which the employee is qualified, with or without reasonable accommodation, which will not require removal under the provisions of Per 1003.

(d) If the appointing authority is unable to make a reasonable accommodation which will allow the employee to remain in a position within the agency, the appointing authority shall advise the employee in writing that the employee is being removed from the position for non-disciplinary reasons.

(e) Removal from employment under this part shall not reflect discredit upon the prior service of the employee.

Per 1003.04 Written Notice.

(a) The appointing authority shall provide written notice to any employee removed from employment under this part that:

(1) The employee's personnel file shall note that the removal was for non-disciplinary reasons; and
(2) The employee may request resolution of the dispute pursuant to Per 205.07 (a) or may appeal directly to the board under the provisions of RSA 21-I: 58, I.

(b) If applicable, the appointing authority or the employee may make application for the employee removed pursuant to this part to receive disability retirement benefits in accordance with state law.

Per-A 207.12 Review of Cases.

[...]

(b) In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

(1) The disciplinary action was unlawful;

(2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;

(3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or

> (4) The disciplinary action was unjust in light of the facts in evidence.
>
> [...]
>
> (d) In appeals arising out of an application of rules adopted by the director of personnel, the board shall determine if the appellant proves by a preponderance of the evidence that:
>
> (1) The rule was incorrectly interpreted and applied;
>
> (2) The rule was invalid; or

(3) The appointing authority's or the personnel director's application of the rule was unlawful.

STATEMENT OF FACTS

This appeal arises out of a February 17, 2021 Personnel Appeals Board ("PAB" or "Board") Order reinstating Trooper Eric Call ("Trooper Call") as a trooper for the Division of State Police ("Division").

Trooper Call began work as a State Trooper for the Division on December 16, 2011. CR 105.[1] Trooper Call has a history of chronic depression, post-traumatic stress disorder ("PTSD"), and alcohol abuse. Id. On New Year's Eve, December 31, 2018, Trooper Call suffered psychological impairment of sufficient severity to cause him to contact a colleague from work for assistance under the Division's peer-to-peer program. CR 106. The colleague drove Trooper Call to McLean Hospital in Belmont, Massachusetts for psychiatric evaluation. Id. Thereafter, Trooper Call participated in the hospital's recovery programs. CR 105. Trooper Call was discharged with continuing outpatient services provided by Horizons Counseling Center ("Horizons") in Gilford, New Hampshire. Id. Trooper Call applied for leave under the Family Medical Leave Act ("FMLA"). Id The Division granted his request on January 30, 2019. Id.[2] On or about March 11, 2019, Trooper Call returned to full duty after receiving Fitness for Duty clearance from his primary care provider ("PCP"), Dr. Ray Wilt. CR 106, 181.

On April 19, 2019, Trooper Call retrieved a chain of email and text messages from his spouse's cell phone that led him to believe that his

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[1] References to the record are cited as follows:
"CR __" refers to the Certified Record and page number;
"TR __" refers to the Transcript of the Board's January 20, 2021 hearing.

[2] The Board's Order states that the date the Division granted leave was January 30, 2020, but this is an error as Trooper Call returned to duty from leave on March 11, 2019.

marriage was in jeopardy. CR 106.[3] Trooper Call used alcohol, inflicted superficial cuts on his chest, and went for a run to clear his mind. Id. Trooper Call's wife telephoned the trooper's friend and work colleague to help. Id. The colleague located Trooper Call on his run, drove him to his house so he could change clothes, then drove him to Portsmouth Hospital for an assessment. Id. Trooper Call remained at Portsmouth Hospital for four days until a friend drove him to McLean Hospital. Id. Trooper Call again utilized leave under the FMLA, this time until it was exhausted on May 16, 2019. CR 167. Trooper Call remained on a leave status through the summer of 2019. CR 167, 177-78, 181.

During this time, providers at McLean Hospital adjusted Trooper Call's medications and revised his diagnoses to include bipolar disorder, PTSD, and mild alcohol abuse. CR 106. The providers implemented a treatment plan with a duration of at least one year. Id. Trooper Call was released from McLean Hospital after ten days, and transitioned to outpatient services at Horizons. Id. Trooper Call was accepted into McLean Hospital's one-year outpatient program, which provided individual and group sessions. Id. McLean Hospital arranged for community-based medication management in Gilford, New Hampshire with psychiatric nurse Sandy Moore-Beinoras, APRN. Id. Trooper Call also saw a therapist, Lynn Towle, and his treating psychiatrist at McLean Hospital, Dr. Asha Parekh. Id. Dr. Parekh discharged Trooper Call on May 2, 2019, noting a good prognosis, stating that Trooper Call had decision making capacity and that the risk of imminent harm to self or others was low. Id. In order to return to

[3] The Board references 2020 as the year this took place, but again, this was in error.

duty from FMLA leave, the Division required Trooper Call to submit a return to work certification. Tr. 111:15-22.

On or about July 19, 2019, physical therapist, Elizabeth DeBenedictis, signed a Department of Safety certification ("Fitness for Duty form") that released Trooper Call for full unrestricted duty. CR 106, 150. On or about August 1, 2019, therapist Lynn Towle discharged Trooper Call, stating that Trooper Call "made good progress" and was "anxious to get back to work," but that Horizons did not permit Ms. Towle to sign Fitness for Duty forms. CR 178. Ms. Towle noted that Trooper Call transferred care to an outpatient program at McLean Hospital. Id. On August 15, 2019, Trooper Call's PCP Dr. Ray Wilt—the same doctor who cleared Trooper Call for his first return to duty—signed a Fitness for Duty form indicating full, unrestricted duty. CR 107, 179. The above Fitness for Duty form contains a one-page checkbox that indicates if an employee is fit for duty. CR 179. If the Fitness for Duty form does not provide the Department with adequate information to make a determination regarding suitability for duty, the Department requests a written assessment from providers seeking more information. Tr. 112:10-113:6. Given Trooper Call's previous return to duty certification and subsequent psychiatric incident, the Division had a reasonable belief that Trooper Call was not able to perform the essential functions of his role and required more information. CR 181.

Thus, on or about September 11, 2019, the Division notified Trooper Call that it planned to initiate the non-disciplinarily removal process pursuant to *N.H. Admin R.* Per 1003. CR 180-83. *N.H. Admin. R.* Per 1003 provides a mechanism to request medical assessments from treatment

providers. The Division assured Trooper Call that the "steps [were] being taken in order to determine [Trooper Call's] ability to carry out the duties of [his] position" so the Division could "assist [him] in any way [the Division could]." CR 181. The Division informed Trooper Call that even if he was not able to perform all the duties of a trooper, there were mechanisms in place to protect an employee's continued employment, whenever possible. Id. Further, the Division informed Trooper Call that a "thorough and accurate assessment from all of [his] licensed healthcare practitioner(s) [would] assist [the Division] in determining how best to meet [Trooper Call's] needs while still carrying out this department's commitments." Id.

On September 13, 2019, Trooper Call executed authorizations for the Division to speak with his treatment providers. CR 106, 184. Trooper Call's authorization allowed his practitioners to opine on his general state of health related to performing the essential functions of the position, as well as the specific nature of any relevant injury, illness, disability, or condition that may affect the trooper's ability to perform the essential functions of his position. CR 184. The authorization also stated, "[A] thorough and accurate assessment will assist my employer in devising an appropriate course of action." Id. On or about September 30, 2019, the Division sent requests for assessments to four of Trooper Call's providers—Dr. Wilt, Dr. Geoffrey Zhi-Je Liu, Ms. Towle, and Ms. Moore-Beinoras. CR 190, 198, 205 & 213. The requests for assessment asked the providers to supply an appraisal of Trooper Call's physical or mental ability to perform the essential functions of his position as a State Police trooper. CR 190. The requests for assessment were detailed, eight-page packages

that included Trooper Call's class specification, supplemental job description—including his essential duties—and details about his hours, work schedule, and work environment. CR 190-97.

Of note, after Trooper Call signed the authorizations, but before the requests for assessments were sent to his providers, one of Trooper Call's providers executed the one-page Fitness for Duty form. On September 25, 2019, McLean Hospital psychiatrist Dr. Geoffrey Zhi-Je Liu executed a Fitness for Duty form indicating full unrestricted duty. CR 187. Dr. Liu also wrote a three-sentence letter stating only that Dr. Liu had been working with Trooper Call since July of 2019 as his individual therapist, and at that time, it was his "best judgment based on the current information that there [was] no psychiatric contraindication to Trooper Call returning to full unrestricted duty as of the date of this letter, pending continued attendance in weekly individual therapy, group therapy and adherence to psychopharmacology appointments." CR 185. This, however, was not a response to a request for assessment under *N.H. Admin R.* Per 1003. *Compare* CR 185-89 *with* CR 198-203. The request for assessment was not sent to Dr. Liu until September 30, 2019—five days after the date of his Fitness for Duty form. CR 198.

The responses to the requests for assessment were limited. Dr. Wilt wrote a one-page, four-sentence letter stating that Trooper Call was "physically and mentally able to perform the essential functions of his position as a New Hampshire state police trooper." CR 221. Ms. Moore-Beinoras also wrote a one-page letter, with more detail than Dr. Wilt. However, Ms. Moore-Beinoras did not opine on Trooper Call's ability to perform the essential functions of his job, but rather stated only, "[Trooper

Call] *reported* no symptoms that would impede his ability to do his job." CR 222 (emphasis added). Ms. Towle did not send an assessment, and Dr. Liu did not send any further documents aside from the Fitness for Duty form mentioned above.

The Division determined that the letters and Fitness for Duty forms were not responsive to the requested information. CR 223. The Division found that "[n]one of the responses provided any specificity with regards to the nature of any illness, disability or condition which would affect [Trooper Call's] ability to perform the essential functions of a State Trooper I." Id. The Division, therefore, arranged for Trooper Call to undergo an Independent Medical Examination ("IME") pursuant to *N.H. Admin. R.* Per 1003.02(f). CR 223.

Dr. Eric Mart performed the IME on December 19, 2019. CR 226. Dr. Mart issued his report on March 10, 2020. Id. Dr. Mart reviewed Trooper Call's treatment records from Trooper Call's providers, the responses to the request for assessment from Dr. Wilt and Ms. Moore-Beinoras, the letter sent with the Fitness for Duty form from Dr. Liu, internal communications from the Division regarding Division personnel's responses to Trooper Call's two psychiatric episodes, and Trooper Call's performance summary from October 2017 to September 2018. CR 226-31. Dr. Mart conducted a clinical interview of Trooper Mart. CR 232-34. Dr. Mart also conducted a battery of tests. CR 234-36. Dr. Mart concluded that Trooper Call "is an individual with well above average reasoning abilities." CR 236. Dr. Mart also concluded that Trooper Call was "quite anxious and depressed" and was using "considerable ego strength and other positive personal qualities to contain his worry and stress." Id. Dr. Mart found that

at the time, Trooper Call was likely "back to baseline," but that Trooper Call had a long-term pattern of emotional volatility. Id. Dr. Mart believed that the best diagnosis of Trooper Call included Bipolar II disorder, in partial remission, other personality disorder with borderline and dependent features, and alcohol use disorder in early remission. CR 237. Dr. Mart also believed that Trooper Call suffered from complex PTSD. Id.

Dr. Mart then assessed Trooper Call's fitness for duty as a trooper, which he admitted was a difficult task. Id. Trooper Call had returned to baseline, did not suffer from any cognitive impairment, did not have active symptoms of bipolar disorder, and had not consumed alcohol since 2019. Id. However, Dr. Mart opined that Trooper Call was always at high risk for "some type of breakdown or decompensation" because Trooper Call was "putting a great deal of energy into keeping his problems under control." Id. Dr. Mart believed "it was only a matter of time before some combination of alcohol use, relationship instability, or job stress caused [Trooper Call] to decompensate." CR 231. Dr. Mart concluded that Trooper Call was at "very high risk for relapse" and "[g]iven the nature of his duties as a state trooper and the extremely high risk of relapse, it [was his] recommendation that [Trooper Call] not be considered fit for duty at this time or in the foreseeable future." Id.

On May 7, 2020, the Division removed Trooper Call for non-disciplinary reasons pursuant to *N.H. Admin R.* Per 1003. CR 243-46. Trooper Call was presented a list of non-law enforcement positions for which he qualified and was informed he could review and consider those positions. CR 244.

STATEMENT OF THE CASE

On or about May 22, 2020, Trooper Call appealed his non-disciplinary removal to the PAB. CR 1-11. The PAB held an evidentiary hearing on January 20, 2021, at which Board members heard testimony from Trooper Call, Human Resources Director Christina Martin, and the Colonel of State Police Nathan Noyes. CR 104. On or about February 17, 2021, the PAB issued an order stating that the "outcome of this case hinges on whether the assessments from the treating care providers on [Trooper Call's] fitness for the return to unrestricted duty were responsive to the State's requests, and therefore negated the State's right to obtain an IME." CR 110. The Board held that taken in the aggregate, Trooper Call's treatment providers' opinions adequately addressed the general state of Trooper Call's health and fitness for return to duty. CR 111. The Board determined that, as a whole, the providers' answers were responsive to the Division's request for assessment. Id. Thus, according to the PAB, the Division was not authorized to request an IME where its request for assessment had been satisfied. CR 111-12. The Board utilized the standard of review in *N.H. Admin. R.* Per-A 207.12(b) for disciplinary appeals, and determined that the Division violated the Rules of the Division of Personnel by imposing the non-disciplinary termination. CR 112.

In fashioning remedies, the Board "invoke[d] its broad authority under RSA 21-A:58, I to tailor the decision to fit the circumstances of this

case."[4] Id. The Board found that Trooper Call was fit to return to duty and reinstated Trooper Call under the following conditions:

> 1. [Trooper Call] will remain in active outpatient treatment as recommended by his treatment providers with appointments and meetings scheduled in a manner that will minimize the impact on his work schedule, and will continue to maintain his recovery;
>
> 2. [Trooper Call] will submit quarterly progress reports from one of his licensed treatment providers to [Human Resources] and to the Board for one year to demonstrate continued compliance with the treatment plan and both entities will preserve the confidentiality of these medical records; the first report will be due on May 1, 2021;
>
> 3. [Trooper Call] will work a regular work week but on shifts approved by his health care provider(s) to accommodate the treatment plan and he will keep DOS apprised of his availability based on the recommendations of his treatment Providers;
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> 4. [Trooper Call] will also focus on preserving the integrity of the family unit for the sake of the young children—he must accordingly limit his availability for overtime and/or details to the equivalent of one shift per week for one year from the date of this decision; this condition is intended to reduce the level of stress both on the job and at home;
>
> 5. The State will reinstate [Trooper Call] to his rank and salary base retroactively to the date of his dismissal with full back pay and benefits;

[4] The Board notes its powers under RSA 21-A:58, but as described below, those powers actually exist in RSA 21-I:58.

> 6. The State will remove from [Trooper Call's] personnel file the letter of dismissal dated May 7, 2020; and
>
> 7. The board retains the right to modify this decision for good cause at the request of [Trooper Call], the State, or on its own motion as the interests of justice and public safety may require.

CR 112-13.

The Division filed a Motion for Rehearing on March 19, 2021. CR 114-38. First, the Division argued that the PAB applied the wrong standard of review when it employed the disciplinary appeal standard contained in *N.H. Admin. R.* Per-A 207.12(b). CR 115. The Division asserted that appeals of non-disciplinary removals must be heard under *N.H. Admin. R.* Per-A 207.12(d), which governs appeals arising out of an application of rules adopted by the Director of Personnel. CR 115-20.

The Division also argued that the Board misinterpreted *N.H. Admin. R.* Per 1003.02. CR 120-21. The Department argued that the PAB allowed Trooper Call to provide much less medical information than the rule mandates. CR 121. The medical information that Trooper Call's providers sent to the Division contained no assessment detailing Trooper Call's general state of health as it related to performing the essential functions of the position, which is required by *N.H. Admin. R.* Per 1003.02(a)(1)(a). Id. Nor did Trooper Call's providers detail the specific nature of his condition that may affect his ability to perform all of the essential functions of the position, which is required by *N.H. Admin. R.* Per 1003.02(a)(1)(b). Id. Thus, the Division argued, the Board erred when it held that the medical

information supplied by Trooper Call's providers satisfied the requirements of *N.H. Admin. R.* Per 1003. CR 120-21.

Finally, the Division argued that the Board exceeded its statutory authority in crafting its relief. CR 130-37. The Order constituted an overreach of the Board's statutory authority. CR 130. The Board supplanted itself as the appointing authority by adding terms and conditions to Trooper Call's employment and exercising continuing jurisdiction over Trooper Call's relationship with the Division, thereby interfering with the Division's powers as the appointing authority. CR 131, 33-35.

On May 21, 2021, the Board denied the Motion for Rehearing. CR 146-49. The Board agreed that the wrong standard of review was applied, but held that Trooper Call's providers rendered clear opinions that satisfied the "responsiveness" factor in *N.H. Admin. R.* Per 1003.02(e) and negated the need for an IME. CR 148. The Board also concluded that it acted within its scope of authority under RSA 21-I:58, I in ordering the above relief. CR 149.

On June 21, 2021, the Division filed the instant appeal.

SUMMARY OF THE ARGUMENT

This appeal centers on the Division's referral of Trooper Call to an independent medical examiner and the remedies the Board ordered upon a finding that the referral was improper under the rules.

First, the Personnel Appeals Board incorrectly interpreted and applied *N.H. Admin. R.* Per 1003 when it held that Trooper Call's providers supplied adequate assessments to demonstrate that Trooper Call was able to perform the essential functions of his job. The Board erred as a matter of law where it held that mere conclusions of fitness for duty—without more—were sufficient to satisfy the requirements of the administrative rules of the Division of Personnel. In fact, the rule allows the appointing authority to determine whether the information provided in reply to the request for assessment is responsive. *N.H. Admin. R.* Per 1003.02(e). By the rule's plain terms, an assessment must detail the employee's state of health related to performing the essential functions of the position and the specific nature of the condition that may affect the employee's ability to perform all of the essential functions of the position. *N.H. Admin. R.* Per 1003.02(a). The Board misinterpreted the rule where it allowed mere conclusions about fitness for duty to negate the need for an IME. Further, the Board made substantial errors of fact when it ruled that the providers' conclusions were responsive to the request for medical assessment.

Second, after ruling that the Division improperly referred Trooper Call to the IME, the Board far exceeded its statutory authority in fashioning remedies. The Board reached outside the employment relationship to dictate Trooper Call's medical care and the Division's internal operations.

If this extreme reach is a permissible exercise of statutory authority, as the Board posits, then the legislature's delegation of power pursuant to RSA 21-I:58, I is unconstitutional.

STANDARD OF REVIEW

A PAB decision may be overturned when it contains an error of law or is clearly unjust or unreasonable. *Appeal of Alexander*, 163 N.H. 397, 401 (2012). In reviewing a PAB finding, the Supreme Court determines whether the findings are supported by competent evidence in the record. *Appeal of Silva*, 172 N.H. 183, 186 (2019). The Court reviews the PAB's interpretation of statutes and administrative rules *de novo*. *Appeal of N.H. Division of State Police*, 171 N.H. 262, 266 (2018).

Further, pursuant to *N.H. Admin. R.* Per-A 207.12(d),[5] the Board may only overrule the decision of an agency if the employee proves by a preponderance of the evidence that:

(1) The rule was incorrectly interpreted and applied;

(2) The rule was invalid; or

(3) The appointing authority's or the personnel director's application of the rule was unlawful.

N.H. Admin. R. Per-A 207.12(d).

[5] The Board initially employed the standard of review for disciplinary appeals under *N.H. Admin. R.* Per-A 207.12(b), but agreed with the Division in its Motion for Rehearing and revised the decision to incorporate the standard for application of personnel rules in *N.H. Admin. R.* Per-A 207.12(d).

ARGUMENT

I. THE BOARD INCORRECTLY HELD THAT THE TREATMENT PROVIDERS' STATEMENTS WERE ADEQUATELY RESPONSIVE.

The PAB made both an error of law and an error of fact when it held that the Division misapplied *N.H. Admin. R.* Per 1003. The Board mistakenly interpreted *N.H. Admin R.* Per 1003 when it held that mere conclusions of fitness for duty were adequate to satisfy the request for assessment. Further, the Board relied upon significant factual errors in coming to its conclusion.

A. The Board committed an error of law when it held that *N.H. Admin R.* Per 1003.02 required only treatment providers' conclusions on fitness for duty.

The Board committed an error of law when it interpreted *N.H. Admin. R.* Per 1003.02(a)(1) to require only conclusory statements that the employee is fit to return to work. In fact, the rule explicitly requires a written assessment detailing the employee's general state of health related to the performance of the essential functions of the position and the specific nature of the relevant condition which may affect the employee's ability to perform all of the essential functions of the job. *N.H. Admin. R.* Per 1003.02(a)(1). The Board erred when it held that the Division inappropriately referred Trooper Call to an IME in violation of *N.H. Admin. R.* Per 1003.02.

N.H. Admin. R. Per 1003 allows the State to remove an employee for non-disciplinary reasons. The rule contemplates non-disciplinary removal

for medical conditions that interfere with the workplace or render an employee unable to perform the essential functions of his or her job. *N.H. Admin. R.* Per 1003.01. The IME referral process is the final step in a lengthy process to review an employee's ability to physically or mentally perform the essential duties of his or her job. To start:

> When an appointing authority believes that … a full-time employee might need to be removed for non-disciplinary reasons, the appointing authority shall: (1) Inform the employee in writing that the employee shall be required to provide the appointing authority with a written assessment from the employee's licensed health care practitioner detailing: a. The employee's general state of health related to performing the essential functions of the position; and b. The specific nature of any relevant injury, illness, disability or condition which may affect the employee's ability to perform all of the essential functions of the position.

N.H. Admin. R. Per 1003.02(a).

Once the appointing authority informs the employee of the need for a written assessment, the employee must provide the appointing authority with the name and address of his or her providers and an authorization allowing the release of assessment information from the provider to the appointing authority. *N.H. Admin. R.* Per 1003.02(b). Armed with a list of providers and a release, the appointing authority is then tasked with providing the employee's class specification, supplemental job description, work schedule, and a description of the employee's work location and environment to the providers. *N.H. Admin. R.* Per 1003.02(c).

Then, if the appointing authority determines that the information supplied by the providers is "unresponsive to the assessment request, the appointing authority shall arrange to have an independent medical

assessment of the employee performed." *N.H. Admin. R.* Per 1003.02(e). This is the IME.

Here, there is no question that the Division took all the proper steps to request assessments from treatment providers. The Division maintained a reasonable belief that Trooper Call was not able to perform the essential functions of his job because he had already received a Fitness for Duty certification that proved to be unsound. Further, the Division received a written authorization from Trooper Call to seek written assessments of his condition. Finally, the Division sent four providers detailed, eight-page requests for assessments in accordance with the Rules of the Division of Personnel. Thus, the only remaining question is whether the assessments the Division received from Trooper Call's treatment providers were responsive to the assessment request. The Board incorrectly found, "Considered together, [the providers'] opinions satisfied the 'responsiveness' factor of the rule and negated the need for an IME." CR 148.

The Board committed an error of law because it required only that Trooper Call's treatment providers supply a mere conclusion that Trooper Call was fit for duty with no written assessment. "When interpreting both statutes and administrative rules, [the Court] ascribe[s] the plain and ordinary meanings to the words used, looking at the rule or statutory scheme as a whole, and not piecemeal." *Appeal of N.H. Division of State Police*, 171 N.H. at 266-67 (citation omitted). In addition to staying faithful to the plain language, one cannot add words which the lawmakers did not see fit to include. *Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 758-59 (2014) (citation omitted). Pursuant to *N.H. Admin. R.* Per

1003.02(a), the providers are required to deliver a "written assessment … *detailing* … [t]he employee's general state of health related to performing the essential functions of the position; and … [t]he *specific nature* of any relevant injury." *N.H. Admin. R.* Per 1003.02(a) (emphasis added). The Division of Personnel rule plainly requires a written assessment of the specific nature of the ailment as well as how the employee's health relates to the performance of the employee's essential job functions. *N.H. Admin. R.* Per 1003.02(a). That demands—at a minimum—that an assessment include information as to the possible behavioral and experiential characteristics of the condition in question that may affect the employee's ability to perform his job, which in this case was alcohol disuse, PTSD, borderline and bipolar disorder.

The Board's determination that the providers' bare conclusions—with nothing more—satisfied the rule's requirements defies the plain language of the administrative rule. Only two providers supplied responses to the assessment request dated September 30, 2019. Dr. Wilt wrote only that Trooper Call was "physically and mentally able to perform the essential functions of his position as a New Hampshire state police trooper." CR 221. Ms. Moore-Beinoras did not opine on Trooper Call's ability to perform the essential functions of his job, but merely echoed Trooper Call's own sentiments about his ability to return to work. CR 222. Dr. Liu did not respond to the assessment request, but did respond to the Fitness for Duty request and only indicated that it was his "best judgment based on the current information that there [was] no psychiatric contraindication to Trooper Call returning to full unrestricted duty as of the date of this letter, pending continued attendance in weekly individual

therapy, group therapy and adherence to psychopharmacology appointments." CR 185. Ms. Towle refused to provide any response to the request for assessment.

None of these responses contained a written *assessment* regarding Trooper Call's general state of health related to performing the essential functions of his position nor the specific nature of his psychiatric diagnoses, as required by the rule. In contrast, Dr. Mart, the physician who performed the IME, detailed the specific nature of Trooper Call's diagnoses. Dr. Mart then specified how those diagnoses could interfere with Trooper Call's duties as a law enforcement officer.

With no assessment information, the Division was stripped of its ability to evaluate Trooper Call's health in relation to the essential functions of the job and make an informed decision regarding the trooper's continued employment. A trooper is tasked with responding to stressful and emergent situations. A trooper must make arrests, pursue fleeing suspects, carry a firearm, and potentially use lethal force. CR 191-95. A trooper must also "intervene[ ] in disputes to restore peace and ensure safety of the public and parties involved, including confronting hostile persons, mediating disputes, and advising of rights and process." CR 191. The Division faced a difficult decision as to whether Trooper Call was able to return to duty. The Division must consider more than the employee's well-being; it must also consider its mission. It is critical for the Division to know how a trooper's condition will impact his essential job functions so the Division may make an informed decision that has larger impacts on public safety.

Colonel Noyes testified that state troopers are unique in law enforcement in terms of autonomy; they can often go a week or more without contacting supervisors, and the work itself is stressful. Tr. 129:18-130:4. Colonel Noyes testified that he relied on the detailed assessments in Dr. Mart's report to aid him in making his employment decision. Tr. 137:14-138:15; 139:17-140:21. The process under *N.H. Admin. R.* Per 1003.02 requires an IME when an appointing authority needs more information to make an informed decision as to whether or when an employee can return to work. The Division properly interpreted and applied the rules when it determined that mere conclusions—without more—regarding Fitness for Duty was not enough to satisfy the assessments required by *N.H. Admin. R.* Per 1003.02.

Further, the PAB misinterpreted the rule when it prohibited the Division from making the IME determination. The language of the rule is clear: "If *the appointing authority* determines that the information supplied by the employee's licensed health care practitioner is unresponsive to the assessment request, the appointing authority shall arrange to have an independent medical assessment of the employee performed." *N.H. Admin. R.* Per 1003.02(e) (emphasis added). Here, the Board has taken the decision out of the Division's hands and prohibited it from requesting an independent medical exam, contrary to the plain language of the rule.

B. The Board committed an error of fact when it determined that the treatment providers' conclusions were responsive to the request for medical assessment.

To the extent the Board made factual determinations that the medical conclusions provided by Trooper Call's treatment providers satisfied the Rules of the Division of Personnel, the Board's order was unjust or unreasonable. "The PAB's findings of fact are presumed prima facie lawful and reasonable. In reviewing the PAB's findings, [the Court's] task is not to determine whether [it] would have found differently or to reweigh the evidence, but rather to determine whether [the Board's] findings are supported by competent evidence in the record." *Appeal of Silva*, 172 N.H. 183, 186 (2019). The Board's findings of fact are unsupported by the record. The medical documentation was entirely conclusory, containing no assessment of Trooper Call's general state of health in relation to his job duties. Further, the Board seemed to conflate a Fitness for Duty form with a request for assessment, which appeared to impact the Board's decision greatly.

The Board found that the reports were satisfactory in the aggregate. *See* CR 111 ("Taken together, these five assessments satisfactorily respond to subsection (a) on the general state of the appellant's health and fitness for return to duty."); CR 148 ("The Board found that the aggregate medical records were sufficient to satisfy the 'responsiveness' factor of Per 1003.02 and the Board concludes that it did not misinterpret or misapply the rule."). The concept of aggregation appears to be a solution the Board found to address an implicit finding that none of the reports could stand on its own

merits. Standing alone, the records upon which the Board relied do not include any satisfactory responses. It is unclear how the Board aggregated these conclusory documents to generate responsive assessments.

The Board accorded "great[ ] weight to the five aggregate assessments." [6] CR 112. The assessments included Ms. Towle's discharge summary and Ms. Moore-Beinoras' assessment—neither of which included any actual recommendations as to Trooper Call's ability to perform the essential functions of his position. Dr. Wilt, a general practitioner and the same doctor that signed off on Trooper Call's first return to duty, submitted only a Fitness for Duty form and a letter that did little more than repeat what was on the form. Dr. Liu failed to submit a response to the Division's request for an assessment. His Fitness for Duty certification and corresponding letter do not identify any specific information about Trooper Call's diagnoses, medical conditions, treatment plan, or medication. There was virtually nothing in Dr. Wilt's or Dr. Liu's individual reports that informed the Division as to the scope of these doctors' knowledge regarding Trooper Call's medical diagnoses, treatment plan, and ability to perform the essential functions of his job. The Division requested specific, particularized information from these doctors, and the responses received were conclusions without explanation. In short, there was nothing in these reports that permitted the Division to assign them any weight.

Further, the Board erred factually when it mistakenly characterized Ms. Moore-Beinoras' report as saying that *she herself* stated there were no

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[6] The Board's five "assessments" include: Dr. Wilt's Fitness for Duty form and subsequent letter; Ms. DeBenedictis' Fitness for Duty form dated July 9, 2019; Dr. Liu's September 25, 2019 Fitness for Duty form and letter; Ms. Moore-Beinoras' assessment; and McLean psychiatrist Dr. Parekh's discharge summary.

symptoms that would impede Trooper Call's ability to do his job. CR 112. That is not what the assessment said. To the contrary, Ms. Moore-Beinoras only said "*he* [Trooper Call] *reported* no symptoms that would impede his ability to do his job." CR 222 (emphasis added). This is not a medical provider's assessment at all; at best, it reflects Trooper Call's self-assessment about his readiness to return to work.

The Board also pointed to a discharge summary from May 2019 authored by Dr. Parekh at the McLean Hospital, stating that Dr. Parekh described Trooper Call as stable with a good prognosis for recovery and low risk of harm. CR 112. First, and foremost, Dr. Parekh's discharge summary was not a response to the Division's request for assessment and otherwise does not constitute a source of assessment information authorized by *N.H. Admin. R.* Per 1003.03(b). Dr. Parekh issued this discharge summary *four months prior* to the Division's initiation of the non-disciplinary removal process. Again, there is nothing in this report that would assist the Division in making a decision about Trooper Call's readiness to return to work. While the report included the Trooper Call's diagnosis of alcohol disuse, PTSD, bipolar disorder, and borderline personality disorder, the purpose of the report was to record his discharge from a "secure structured inpatient setting to outpatient treatment." CR 175. It identified risk factors of alcohol relapse and mental illness, and while it said the risk of imminent harm to self and others is low, that is far from a recommendation that Trooper Call was able to perform the essential functions of a state police trooper. It was therefore unjust and unreasonable for the Board to have relied on this record to support its decision.

Finally, the Board also credited a Fitness for Duty form submitted by Elizabeth Benedictis and mistakenly identifies her as a counselor. CR 111. Ms. Benedictis was not a counselor, and she did not provide any services related to Trooper Call's mental health. Rather, she was a medical provider that helped Trooper Call with a physical injury and signed a Fitness for Duty certification related to that physical injury. CR 181, 250. This perfectly exemplifies the folly of reliance upon a Fitness for Duty form alone or in combination with other Fitness for Duty forms to convey the detailed information required under *N.H. Admin. R.* Per 1003.02(a).

Trooper Call's providers submitted no information to aid the Division in its assessment of the impact that Trooper Call's condition had on his ability to perform the essential functions of his role in law enforcement. This is precisely the situation in which an IME is not just appropriate, but necessary, as the rule contemplates. Thus, to the extent that the Board made factual findings that the providers' opinions met the requirements under *N.H. Admin. R.* Per 1003.01, the Board's order is unjust and unreasonable in light of the facts in evidence.

II. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY IN FASHIONING REMEDIES

A. The Board lacks the statutory authority to address issues other than the appointing authority's exercise of discretion.

The Board exceeded its statutory authority in fashioning remedies in this matter. The conditions imposed in the Board's order strongly imply that the Board credited the IME's conclusion that Trooper Call was not able to perform the essential functions of his job. Having rejected that

conclusion, the Board's conditional reinstatement of Trooper Call is inconsistent with such a rejection and constitutes overreach of its authority to fashion relief under RSA 21-I:58, I.

RSA 21-I:58, I allows the Board to hear appeals from employees "affected by any application of the personnel rules," with limited exceptions inapplicable to this case. RSA 21-I:58, I. The statute reads:

> If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, gender identity, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. … *In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just*.

Id. (emphasis added). The Board may only hear and rule upon matters regarding the interpretation and application of the personnel rules as provided by RSA 21-I:57 and 21-I:58, with limited exceptions. RSA 21-I:46. RSA 21-I:58 must be read to comport with the personnel statutory and regulatory scheme as a whole. *See Appeal of N.H. Division of State Police*, 171 N.H. 262, 270 (2018) ("The purpose of the personnel rules is to implement the statutes governing the Division of Personnel and the PAB, and to establish a statewide system of personnel administration based on sound management techniques.") (citations, quotations, and ellipses omitted). In fact, "[t]he statutory and regulatory scheme … does not eliminate the discretion of the Division, nor undermine the uniformity or

integrity of the personnel system; rather, it provides a mechanism for *review of the appointing authority's exercise of discretion*." *Id*. (*citing* RSA 21-I:58, I) (emphasis added).

When fashioning remedies in this case, the Board interpreted the last sentence of RSA 21-I:58, I to allow it to reach beyond the appointing authority's discretionary act—namely the Division's request for an IME—in order to oversee both the private life of the employee and the Division's internal operations. The Board's conditional reinstatement of Trooper Call imposes obligations upon him to continue medical treatment and maintain recovery, submit quarterly progress reports to human resources and the PAB for one year to demonstrate continued compliance with his medical plan, work a regular work week on shifts approved by his health care providers, and focus on preserving the integrity of his family unit for the sake of his young children by limiting his availability for overtime and/or details. CR 112. In addition to reinstatement, back pay, and removal of the non-disciplinary termination from Trooper Call's personnel file, the Board requires the Division to accept Trooper Call's limited duties and schedule around—as well as monitor—Trooper Call's treatment plan and compliance.

By "invok[ing] its broad authority under RSA 21-I:58, I" in fashioning the above remedies (CR 112), the Board exceeded its statutory and administrative authority. The Board has reached into the private life of the employee—obligating him to continue with medical treatment and preserve the family unit—and interfered with the functioning of the Division, requiring it broadly to schedule around any appointments Trooper Call's care may require. Far from reviewing the appointing authority's

decision, as in *Appeal of N.H. Division State Police*, *supra*., the Board has essentially substituted itself as the appointing authority, imbuing itself not only with the power to direct the overall functioning of the agency, but with the power to control the personal life of the employee; a power that the actual appointing authority does not possess.

In ordering Trooper Call to remain in active outpatient treatment, submit quarterly reports from his providers, and "focus on preserving the integrity of the family unit for the sake of the young children," the Board has fashioned paternalistic remedies to reach into the private life of Trooper Call without citing any authority to do so apart from its "broad authority under RSA 21-I:58." CR 112. The Board abandons any semblance of working within the employment relationship and attempts to improperly direct Trooper Call's medical treatment and home life.

Further, in ordering the Division to accommodate Trooper Call's regular work schedule approved by his health care provider,[7] the Board supplants itself as the appointing authority under the Americans with Disabilities Act and corresponding state antidiscrimination laws. *See* 42 U.S.C. § 12112(b)(5)(A); RSA 354-A:7, VII(a). In doing so, the Board renders the Division powerless to assess requests for accommodation in light of operational needs. The Board does not have the law enforcement expertise to decide when an accommodation for a trooper is reasonable.[8]

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[7] State Troopers are expected to work in emergent or special situations in which neither the Division nor the trooper has control over the time or place of emergency.

[8] *See* RSA 21-I:45 (describing the composition of the five-member Board to include: two members who have been employed as labor relations or personnel professionals; one member who has been employed within a public personnel field; and two members who are licensed attorneys).

Additionally, where the Board ordered Trooper Call to remain in treatment and limit overtime and detail work in order "to reduce the level of stress both on the job and at home," the Board plainly signals that it did not credit Trooper Call's treatment providers' statements that Trooper Call was fit to return to duty. The Board has acted in a way the Division never could. Certainly, the Division could address medical conditions with a trooper and work with a trooper to find reasonable accommodations, but the Rules of Personnel do not provide a mechanism for the Division to order Trooper Call to continue his mental health treatment or preserve his family unit. The Board's limitations on Trooper Call's reinstatement far exceed any grant of power to any appointing authority in the administrative Rules of the Division of Personnel or statute.

Finally, the Board also exceeded its authority in exercising continuing jurisdiction over this matter. The Board ordered Trooper Call to submit quarterly progress reports to the Board "to demonstrate continued compliance with the treatment plan," and "retain[ed] the right to modify this decision for good cause … as the interests of justice and public safety may require." CR 112-13. RSA 21-I:46, IX directs that the Board may keep a matter open only under circumstances in which it needs additional information to make a determination. RSA 21-I:46, IX ("The board shall issue final decisions on all appeals within 45 days of the date of hearing …. If the board determines that it requires additional time *for the proper investigation or determination of the facts or issues involved*, it shall notify the employee or employees making the appeal in writing of the reasons for the delay and provide an estimate to such employee or employees of the additional time required." (Emphasis added)). Unlike other administrative

agencies who are authorized to exercise continuing jurisdiction,[9] the Board is not vested with such power. Thus, the Board acted outside its authority when it exercised continuing jurisdiction over the remedies ordered in this case.

B. If the Board is granted such broad statutory authority to fashion remedies, such authority is an unconstitutional delegation of power.

The Board's interpretation of the authority granted to it under RSA 21-I:58 should be rejected as it would render the statute unconstitutional as an improper delegation of legislative power. "Under the separation of powers article of the New Hampshire Constitution, the General Court may not create and delegate duties to an administrative agency if its commands are in such broad terms as to leave the agency with unguided and unrestricted discretion in the assigned field of its activity." *In re Blizzard*, 163 N.H. 326, 331-32 (2012). "To avoid the charge of unlawfully delegated legislative power, a statute must lay down basic standards and a reasonably definite policy for the administration of the law." *Id*. at 332. The General Court vested the PAB "in all cases" with the power to "change or modify any order of the appointing authority, or make such other order as it deems just." RSA 21-I:58, I. The Board has interpreted this language as authorizing it to act with unfettered discretion, in this case issuing unguided and unrestricted remedies it "deems just."

As interpreted by the PAB, RSA 21-I:58, I is an unconstitutional legislative delegation of power to the Board because the legislature failed to

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[9] *See* RSA 365:28 (permitting the Public Utilities Commission to "modify any order made by it").

fashion basic standards or a reasonable definite policy for the administration of the law. This Court has held delegations like that in RSA 21-I:58, I unconstitutional in other contexts. In *Guillou v. State, Div. of Motor Vehicles*, 127 N.H. 579 (1986), the Court examined a statute that granted the Director of the Division of Motor Vehicles authority to "order any license issued to any person under the provisions of this title to be suspended or revoked, after due hearing, for any cause which he may deem sufficient." The Court stated:

> [T]he statute grants authority to an administrative officer without any express or implied qualifications, and thus provides no aid for judicial construction. … Further, the phrase "for any cause which he may deem sufficient" does not provide any legislative guidance for the director in making suspension or revocation decisions. The State argues that the director will look to the statute as a whole for general guidance. The language of RSA 263:56, however, does not mandate, let alone suggest, such a procedure. Even if the director stays within the bounds of the related provisions (e.g., RSA 263:55, revocation for third offense), the potential for arbitrary and unprincipled decisions is great.

Id. at 581. Here, as in *Guillou*, if the authority conferred by RSA 21-I:58, I is limitless, the PAB has great potential to issue arbitrary and unprincipled decisions.

Through the canon of constitutional doubt, the Court construes statutes to comport with constitutional requirements when possible. *See Polonsky v. Town of Bedford*, 171 N.H. 89, 96 (2018); *see also In re Blizzard*, 163 N.H. at 332. Thus, the language in RSA 21-I:58, I must be bound by the principles of the personnel statutory and regulatory scheme. Otherwise, the Board is left with plenary power to act in any way it deems

just, including in ways the appointing authority cannot act, creating an impermissible delegation of authority. Here, as outlined above, the PAB has far exceeded any authority found in the rules of the Division of Personnel.

Moreover, the PAB's unchecked discretion significantly impacts the Division's ability to function day to day. First, the Board made scheduling decisions for the Division to accommodate Trooper Call's treatment plan without knowing or addressing the Division's operational needs. The Division of State Police operates twenty–four hours per day, seven days per week, and must respond to unanticipated public safety and other events in a way that requires flexibility in deploying troopers. This is not consistent with the conditions the PAB has imposed. Further, the order undermines the Division's ability to rely upon its future personnel decisions, especially where the Board stated it "retain[ed] the right to modify this decision for good cause … as the interests of justice and public safety may require." CR 113. Finally, the Board reinstated Trooper Call and found that he was fit to return to the demands of duty, yet ordered him to limit his availability for overtime and details to "reduce the level of stress both on the job and at home." CR 112. Every trooper is issued a firearm and deployed to patrol and respond to public safety situations as they arise. Trooper Call is no different. He will respond to automobile accidents, he will stop vehicles breaking traffic safety laws, perhaps have to conduct vehicle or building searches and even arrests, among other duties and responsibilities. CR 191-95. Troopers perform high stress, psychologically demanding services for the State, and public safety depends on their fitness for duty. No matter the schedule, troopers may find themselves in uncontrolled and potentially

dangerous environments. The Board's substitution of itself for the Division, after accepting conclusory records and essentially ignoring an IME that casts serious doubt on Trooper Call's ability to perform the essential functions of his job, potentially endangers the citizens of New Hampshire.

Fundamentally, the Board lacks the law enforcement expertise to substitute its discretion for the Division's superior knowledge. The Board significantly interfered with the Division's operations when it reinstated Trooper Call despite the IME findings that he was not fit to return to duty. Thus, the Board's interpretation of RSA 21-I:58, I—granting itself unrestricted authority—materially affects the operations of the Division of State Police. It is difficult to imagine that the legislature intended the Board, and not the Division, to oversee Trooper Call's performance of his employment duties.

In this matter, the Board has ordered remedies that exceed the power of the appointing authority, fall outside the employment relationship, and reach into the personal life of Trooper Call. The Board's interpretation of what it deems "just" is without basic standards or legislative guidance. If the legislature intended to grant the Board such unrestricted power, then for the reasons above, RSA 21-I:58 would be an unconstitutional delegation.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below and dismiss Trooper Call's appeal to the Personnel Appeals Board.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DIVISION OF STATE POLICE

JOHN M. FORMELLA
ATTORNEY GENERAL

ANTHONY J. GALDIERI
SOLICITOR GENERAL

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/s/ Jessica A. King
Jessica A. King, Bar No. 265366
Assistant Attorney General
New Hampshire Department of Justice
Transportation and Construction Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3675
Jessica.A.King@doj.nh.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 8270 words.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief shall be served on counsel for the defendant through the New Hampshire Supreme Court's electronic filing system.

January 14, 2022 */s/ Jessica A. King*
Jessica A. King