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

REPLY BRIEF FOR THE NEW HAMPSHIRE DIVISION OF STATE POLICE

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(Fifteen-minute oral argument requested)

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ARGUMENT

I. THE BOARD COMMITTED BOTH ERRORS OF LAW AND FACT IN CONCLUDING THAT THE TREATMENT PROVIDERS' STATEMENTS WERE ADEQUATELY RESPONSIVE.

Contrary to Appellee Trooper Eric Call's ("Trooper Call") assertions, the New Hampshire Personnel Appeals Board ("PAB" or "Board") committed 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 misread the plain meaning of the rule, committing an error of law. Further, the PAB made significant factual errors in reaching 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 (1) undisputed clinical diagnoses and (2) a general statement of health and fitness to return to unrestricted duty. CR 112. [1] Trooper Call states only that the Division of State Police ("Division") "mischaracterizes" the Board's error as one of law, but provides no support for this statement. AB 25.

This case requires the Court to interpret the meaning of *N.H. Admin. R.* Per 1003.02(a)(1), which is a question of law. *See Appeal of Silva*, 172 N.H. 183, 186 (2019). *N.H. Admin. R.* Per 1003.02 explicitly requires a

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

written assessment that details: "(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)(1) (emphasis added). The plain meaning of the rule clearly calls for more than simply a clinical diagnosis and general statement of health and fitness to return to unrestricted duty. *See Appeal of Silva*, 172 N.H. at 186-87 ("When construing a statute's meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used."). The rule explicitly states that the assessment must detail the employee's health in relation to job functions, as well as any specific aspects of the illness that could affect the employee's performance of job functions. The rule also states that the employee *shall* provide such an assessment. *N.H. Admin. R.* Per 1003.02(a)(1).

A detailed assessment permits an appointing authority to evaluate an employee's medical condition in relation to the actual functions of the employee's job and come to an informed opinion about whether the employee is fit for duty. The purpose of *N.H. Admin. R.* Per 1003 is to remove an employee if the employee is physically or mentally unable to perform the essential functions of the position or the employee's physical or mental condition creates a direct threat or hazard to the employee's health or coworkers' wellbeing. *N.H. Admin. R.* Per 1003.01. Without an assessment of the employee's heath in relation to the essential functions of the job, the appointing authority cannot assess whether the employee's medical condition prevents the performance of a job or threatens the

employee and/or a coworker. Thus, the rule requires that the employee supply the appointing authority with an assessment that includes 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.

Here, the Board committed an error of law when it held that *N.H. Admin. R.* Per 1003.02 required only clinical diagnoses and a general statement of health and fitness for duty—what amounts to mere conclusions. This holding defies the plain language of the administrative rule, and makes little sense in the regulatory scheme. It is the appointing authority that determines: (1) if the information provided is responsive to the request for assessment (*N.H. Admin. R.* Per 1003.02(e)); (2) if the employee is capable to remain in his or her position by reviewing assessment information (*N.H. Admin. R.* Per 1003.03(a) & (b)); and (3) if the position can be amended or the employee moved to a different position in the event that the employee can no longer perform his or her duties (*N.H. Admin. R.* Per 1003.03(c)). The appointing authority cannot perform any of these functions unless it is well informed of the employee's impairments.

A detailed assessment is important because appointing authorities best understand the demands of a job, and each job prompts a unique standard of "fitness for duty." For example, where an employee breaks an ankle, her fitness for duty as an attorney is completely different than her fitness for duty as a police officer. A doctor might place movement or weight-bearing restrictions on the employee, but it is the appointing authority that understands how these restrictions affect the position, not the medical provider. Thus, the appointing authority requires a detailed

assessment so that it may know the employee's limitations caused by the medical condition and make an informed decision as to the employee's ability to perform the job or the employee's danger to herself or coworkers.

Trooper Call is mistaken where he states that treating providers' opinions should be given more weight because they are given more weight in workers' compensation cases. AB 31-32. While treating providers are granted a certain amount of deference in workers' compensation cases, those cases are inapplicable here. For instance, in *Appeal of Morin*, the Compensation Appeals Board ("CAB") denied the employee's request to continue the hearing, which was submitted because the employee's treatment provider could not attend. *Appeal of Morin*, 140 N.H. 515, 517 (1995). This Court held that the CAB's denial was an abuse of discretion because it resulted in the inability of the treatment provider to testify as to the contents of his report and explain any discrepancies. *Id*. at 519. Further, in *Appeal of Kehoe*, the Compensation Appeals Board disregarded uncontroverted, extensive testimony from the employee's treatment providers regarding causation of the employee's illness in relation to the work environment. *Appeal of Kehoe*, 141 N.H. 412, 417-18 (1996). In contrast, the independent medical experts talked little about causation and focused instead on whether or not the employee was actually ill. *Id*. at 418. The Court reversed the CAB, reasoning that the CAB could not disregard medical testimony without a factual basis, which did not appear in the record. *Id*. at 418-19.

Here, rather than competing reports in which the Board must weigh evidence, there are no actual assessments from Trooper Call's treatment providers. There is nothing to weigh aside from conclusory assertions of

fitness for duty. This case is entirely distinguishable from workers' compensation claims because if there had been an appropriate assessment, then the Division would not need to seek out an Independent Medical Examination ("IME"). Rather, in the non-disciplinary removal process, there exists either a detailed assessment by the treatment providers or a report from an IME—never both. Thus, where a detailed assessment precludes an IME, no weighing occurs and Trooper Call's argument is misplaced.

As outlined in the Division's brief and below, none of the treatment providers' 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. One need only look to the IME report to find such an assessment, detailing the specific nature of Trooper Call's diagnoses and specifying how those diagnoses could interfere with Trooper Call's duties as a law enforcement officer. CR 226-37. Thus, the Board erred as a matter of law in holding that the plain meaning of the regulation called only for a clinical diagnosis and general statement of health and fitness for duty.

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 and unsupported by the record. In his recitation of facts, Trooper Call falls into the same pitfalls as the Board, which are detailed below.

First, Trooper Call asserts that Dr. Liu's September 29, 2019 letter satisfied the request for assessment and the documentation "seem[s] to indicate" that Dr. Liu reviewed Trooper Call's supplemental job description. AB 27-28. Trooper Call further asserts that he testified that Dr. Liu extensively reviewed his job description. AB 28. Dr. Liu completed a fitness for duty form indicating full unrestricted duty on September 25, 2019, which he faxed to the Division on September 26, 2019. CR 185-89. Dr. Liu also wrote a three-sentence letter to the Division 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 (emphasis added).

Dr. Liu's response was not 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. Rather than simply a fitness for duty form, the request for assessment asks for "an assessment on … Eric Call … in regards to his physical or mental ability to perform the essential functions of his position as a State Trooper." *Id*. The assessment then provides more than the supplemental job description. It also provides the class specification, work schedule, and a written description of the work location and environment. *Id*. Dr. Liu never responded to the request for assessment. Rather, Dr. Liu's earlier submission provided only the checkbox authorization and a letter that Trooper Call could return to full duty as long as he continued attendance at therapy and adherence to pharmacology appointments. Thus, the Division lacked Dr. Liu's assessment of Trooper Call's state of health in relation to his duties. In fact, all the Division had in hand from Dr. Liu was a letter confirming that Trooper Call remained in need of continued treatment, but no description as to why that continued treatment was necessary. Thus, Dr. Liu failed to identify any specific information about Trooper Call's diagnoses, medical conditions, treatment plan, or medication that helped the Division assess Trooper Call's condition in relation to the essential functions of a State Trooper.

Next, Trooper Call argues that because Dr. Wilt was able to review the full request for assessment package, his letter was adequately responsive. AB 28-29. Dr. Wilt, a primary care physician and not a psychologist, was one of two providers that responded to the request for assessment. CR 221. On October 8, 2019, Dr. Wilt wrote that Trooper Call was "physically and mentally able to perform the essential functions of his

position as a New Hampshire state police trooper." *Id*. As with Dr. Liu, Dr. Wilt's letter stated virtually no specific facts that informed the Division as to the scope of Dr. Wilt's knowledge regarding Trooper Call's medical diagnoses, treatment plan, and ability to perform the essential functions of his job.

Trooper Call next argues that Sandi Moore-Beinoras, PMH-APRN, provided an adequate assessment. On October 12, 2019, Ms. Moore-Beinoras authored a letter to the Division that outlined what Trooper Call reported to her, but did not contain her assessment of Trooper Call. CR 22. In his brief, Trooper Call makes the same factual error as the PAB, mistakenly characterizing Ms. Moore-Beinoras' report as saying that *she herself* stated there were no symptoms that would impede Trooper Call's ability to do his job. CR 112. That is not what the letter 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). Ms. Moore-Beinoras' letter dated November 17, 2019 suffers from the same flaw. CR 249. These letters are simply not a medical provider's assessment at all; at best, it reflects Trooper Call's self-assessment about his readiness to return to work.

Finally, Trooper Call asserts that Ms. Towle sent a "rather lengthy letter" detailing Trooper Call's progress. AB 30. However, this "letter" is a discharge summary from Ms. Towle dated August 1, 2019, almost two months before the request for assessment. CR 177-78. Further, rather than describing Trooper Call's condition in relation to his job duties, Ms. Towle describes only Trooper Call's course of care, ending with a note that she does not fill out return to duty forms. *Id*. Ms. Towle's discharge summary

simply did not provide any information necessary for the Division to make an informed decision about Trooper Call's ability to perform the essential functions of his job.

The Board's findings of fact are unsupported by the record because the responses to the requests for assessment were simply unhelpful. Trooper Call states that the Division "did not like the response it received, so it found an IME that was willing to provide the response that it wanted." AB 31. This is far from the truth and makes little sense. The Division simply wanted to understand Trooper Call's condition in light of his job as a State Trooper, a position tasked with dangerous, stressful, and emergent situations. Dr. Mart was an *independent* medical examiner. He had no bias to the outcome of his assessment. Dr. Mart's assessment is thorough, detailing not only generalized fitness for duty and diagnoses, but what those diagnoses mean in the context of the duties of a trooper. CR 236-37. 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.

The Board exceeded its statutory authority in fashioning remedies in this matter. Trooper Call states that the Board has plenary authority to reinstate an employee. AB 38-39.Trooper Call misinterprets the Division's argument. If this Court finds that the Division incorrectly interpreted or applied *N.H. Admin. R.* Per 1003, then reinstatement may be proper. However, the conditions of reinstatement imposed by the Board exceed its statutory authority, as outlined in the Division's brief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jessica A. King, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief, exclusive of tables and certifications, contains approximately 2,599 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 29, 2022 */s/Jessica A. King*
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CERTIFICATE OF SERVICE

I, Jessica A. King, hereby certify that a copy of the State's Reply Brief shall be served on Marc Beaudoin, Esquire, and John Krupski, Esquire, counsel for the Appellee, through the New Hampshire Supreme Court's electronic filing system.

March 29, 2022

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