STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2021-0267

APPEAL OF THE N.H. DEPARTMENT OF SAFETY,
DIVISION OF STATE POLICE

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

BRIEF FOR THE APPELLEE, TROOPER ERIC CALL

TROOPER ERIC CALL

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(Fifteen-minute oral argument requested)

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ISSUE PRESENTED

1. Did the Personnel Appeals Board err when it overturned Trooper Eric Call's non-disciplinary removal?

2. Did the Personnel Appeals Board exceed its statutory authority when it reinstated Trooper Eric Call's employment with the Division of State Police subject to certain conditions?

TEXT OF RELEVANT AUTHORITIES

21-I:58 Appeals.

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

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

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

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

541:13 Burden of Proof.

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

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

***N.H. Admin R.* 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.

Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

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.

Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

Per 1003.03 Removal.

(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.

Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

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.

Source. (See Revision Notes at chapter heading for Per 100) #8738, eff 10-18-06; ss by #10817, eff 5-17-15

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 THE FACTS

The State filed this Rule 10 Appeal with this Honorable Court as a result of a February 17, 2021 Personnel Appeals Board ("PAB" or "Board") Order that reinstated Trooper Eric Call ("Tpr. Call") as a Trooper for the Division of State Police ("Division").

Tpr. Call was employed by the Division as a State Trooper on December 16, 2011, and he was assigned to patrol along with several other specialties, such as the Special Events Response Team ("SERT"), Drug Recognition Expert ("DRE"), and Field Training Officer ("FTO"). CR 105 and TR 419.[1] Tpr. Call has been married for sixteen years and he has four children. TR 420. Tpr. Call had an undiagnosed history of chronic depression, post-traumatic stress disorder ("PTSD"), and alcohol abuse. On New Year's Eve, Tpr. Call consumed an excessive amount of alcohol, and he became engaged in an argument[2] with his spouse. CR 105 and TR 421. Over the next couple of days, he attempted to refrain from the use of alcoholic beverages, but ultimately began to consume them again. TR 421. Tpr. Call characterized his consumption of alcohol as being in a social setting and on his days off only. He did not drink on duty or even on those days that he had duty. TR 422. In late January of 2019, he suffered an

[1] The Appellee will use the same record cites as the State, which are 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 argument was verbal only, which was confirmed by his supervisor.

emotional/psychological breakdown, and he contacted the Division's Peer-to-Peer program, and he was subsequently driven to McLean Hospital in Belmont, Massachusetts. CR 105 and TR 426. He remained at the hospital for several weeks, and he was actively involved in his treatment by attending the therapy that was available to him. TR 428-429. He was eventually discharged from McLean Hospital to outpatient treatment with a counselor, Lynne Towle, at Horizons Counseling Center after participating in recovery programs to include living in a sober residence. CR 105 and TR 430.

On or about March 6, 2019, Tpr. Call was cleared to return to full duty by his primary care physician, Dr. Wilt, because his counselor was unable to clear him to return to duty due to company policy. He returned to duty on March 11, 2019. CR 106, TR 431-432. While he was able to function at work, he did not feel better emotionally and continued to struggle. TR 432. However, Tpr. Call was able to keep his personal emotional struggles in check while he was at work, and he had the wherewithal to contact his supervisor when he was struggling emotionally on April 19, 2020. TR 434. He took the weekend off because he knew he was going to relapse. TR 434. He knew he was going to relapse, because he found some disturbing emails in reference to his spouse. CR 106, TR 433-440. He then resorted to alcohol, inflicted superficial cuts on his chest, and then decided to go for a run to clear his mind. CR 106, TR 435-437. Mrs. Call contacted a mutual friend, who happened to be a Trooper, and that Trooper, along with another Trooper and a

supervisor, caught up with Tpr. Call during the run. TR 438. One of the Troopers drove Tpr. Call to the hospital, where he stayed for four days prior to being transferred back to McLean Hospital. CR 106, TR 441-444. Tpr. Call's Troop Commander, Lt. John Hennessey, drove him to McLean Hospital. TR 444.

At McLean Hospital it was determined that Tpr. Call was misdiagnosed and that the medication he had been previously prescribed exacerbated his condition. CR 106, TR 445-446. His clinical diagnosis was revised[3], a new treatment plan was developed, and his medication was altered. CR 106, TR 445-446. The treating psychiatrist, Dr. Asha Parekh, described Tpr. Call as stable and with a good prognosis for recovery and discharged him from McLean Hospital on May 2, 2019. CR 106. When he was discharged from McLean Hospital[4], he was transferred to the Horizons Counseling Center for outpatient treatment with Lynne Towle until he could be accepted into McLean's one-year outpatient program, which provided weekly individual and group therapy sessions. CR 106, TR 446-447. Tpr. Call was motivated and committed to maintaining his sobriety and stability, and he met with his therapist, Lynne Towle, regularly through Horizons Counseling Center. CR 106 and TR 447. Psychiatric APRN Sandy Moore-Beinoris arranged to manage Tpr. Call's medication after he was discharged from McLean Hospital. CR 106 and TR 447. Tpr. Call would meet with Ms. Beinoris for hourly sessions. TR 447.

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[3] Tpr. Call was diagnosed with bipolar disorder, PTSD, and mild alcohol abuse. CR 106.
[4] Tpr. Call spent 10 days at McLean Hospital. CR 106.

When Tpr. Call's treating healthcare practitioners determined that he was stable and ready to return to work, his primary care physician, Dr. Ray Wilt, again certified that he was fit to return to unrestricted duty by signing the Division's Fitness for Duty Certification. CR107 and TR 451. Again, his counselor, Lynne Towle was supportive of the idea, but she could not clear him for duty[5].

The Division was not satisfied with the clearance for duty that it received from Dr. Wilt, so it decided to send out a request for assessment to all Tpr. Call's providers. CR 106. This request consisted of a cover letter, job classification, supplemental job description, work schedule, location, and environment. CR 190-220. As part of that request, Tpr. Call executed the authorizations for his treatment providers to opine on his fitness to perform the essential duties of his job, which were provided to the treatment providers by the Division. In the extensive packet that the Division sent to Tpr. Call's healthcare practitioners, the cover letter only states in relevant part, "The Department of Safety is requesting an assessment on your patient, Eric J. Call, DOB (omitted), in regards to his physical and mental ability to perform the essential functions of his position as a State Trooper." It does not request anything else of specificity. CR 190-220. On September 30, 2019, the

[5] Lynn Towle is Tpr. Call's therapist at Horizon Counseling Center in Gilford, New Hampshire. It is against Horizon Counseling Center policy to clear someone for duty, which is why Dr. Wilt provided that clearance. Ms. Towle was supportive of Tpr. Call's recover, which is evidenced by her discharge letter. CR177-178.

Division sent the requests to Tpr. Call's various treatment providers. CR 106 and 180-184, 190-220.

On September 25, 2019, Tpr. Call's psychiatrist, Dr. Geoffrey Liu, stated that there was no psychiatric contradiction to Tpr. Call returning to full unrestricted duty. CR 107, 185-189, TR 453-455. On or about August 8, 2019, Tpr. Call's therapist, Lynne Towle, issued a discharge summary that did not necessarily clear Tpr. Call to return to full duty, but it did note that he was participating in therapy, that he had stabilized, and that he continued to be sober. She also stated that she did not have any concerns about Tpr. Call. CR 177-178. Dr. Wilt sent a second letter to the Division on October 8, 2019 restating that Tpr. Call was cleared to return to full unrestricted duty. CR 107, 179 and 221. On October 12, 2019, Ms. Beinotitis, Tpr. Call's APRN that prescribed his medication stated that she had a discussion with Tpr. Call, and that there were no symptoms that would impede his ability to do his job. CR 107, 222, TR 455-458. She sent a second letter into the Division on November 17, 2019 where she states that she reviewed his medication and effectiveness. Again, there was nothing in this letter that would indicate that Tpr. Call was not fit for duty. CR 249, TR 455-458.

On November 4, 2019, the Division notified Tpr. Call that he would need to meet with an independent medical examiner ("IME"), Eric Mart, Ph.D. CR 107, 226-237, TR 461-467. Dr. Mart conducted the IME on December 19, 2019, and he issued his report on March 10, 2020. CR 107 and 226. Dr. Mart stated that the Tpr.

Call had returned to his baseline condition as Tpr. Call gave no indication of current depression or mania despite the pre-existing episodes of emotional volatility, anxiety, and depression. CR 107 and 237. It was also noted that Tpr. Call was completely sober since April of 2019. CR 107. Dr. Mart never provided his report directly to Tpr. Call, nor did the Division ever provide the report to him. TR 461-467. Dr. Mart's report was speculative as to his reasonings as to why Tpr. Call could not return to duty, which was due to Dr. Mart's concern that Tpr. Call ***MAY*** relapse. CR 231. The Division never contacted Tpr. Call's treating healthcare practitioners for further information prior to the non-disciplinary termination. TR 466. Ultimately, Tpr. Call was non-disciplinary terminated on May 7, 2020. TR 465-467.

STATEMENT OF THE CASE

On or about May 22, 2020, Tpr. Owens filed an appeal pursuant to RSA 21-I:58 and Per-A 206.01 with the PAB seeking to overturn his unlawful termination. CR 1-11. The Division terminated the employment of Tpr. Call based primarily on its belief that Tpr. Call was not medically fit for duty. CR 6-11. The non-disciplinary termination was issued on May 13, 2020. CR-9. Prior to Tpr. Call's non-disciplinary termination, the Division, pursuant to Per 1003.02, ordered Tpr. Call to attend an independent medical examination ("IME") where Eric G. Mart, Ph.D, concluded in his assessment that Tpr. Call was not physically or mentally able to perform the essential functions of the position of State Trooper at that time or in the foreseeable future. CR 7, 40-41, 226-237.

On or about February 17, 2021, the PAB issued its order (hereinafter "Order") after it heard a full evidentiary hearing on the merits, in which it determined that the appellant satisfied his burden of proof and established by a preponderance of the evidence that the State violated Per 1003.02 (3) and that he is fit for return to full unrestricted duty based on the totality of the medical evidence. CR 104-113. The PAB stated in its decision, "In conclusion the board determined that the appellant complied with the provisions of Per 1003.02(a)(1) by (a) providing undisputed clinical diagnosis and (b) a general state of his health and fitness for return to full unrestricted duty. The board accorded greater weight to the five aggregate assessments submitted by the treatment providers which the board

determined together to be responsive to DOS's requests. The criteria for soliciting the IME under Per 1003.02(3)[6] were accordingly not satisfied and constituted a rule violation under Per-A 207.12(b)(2)[7]." CR 112. The PAB invoked its broad authority under RSA 21-I:58 to fashion additional remedies that it believed were in the best interest of the Division and Tpr. Call.

The Division subsequently filed a motion for rehearing, and Tpr. Call filed an objection to that motion. CR 114-138 and CR 139-145. The PAB denied the Division's motion on May 19, 2021. CR 146-149. On June 21, 2021, the Division filed a Notice of Appeal with this Court pursuant to Supreme Court Rule 10.

[6] The board mistakenly cited Per 1003.02(3) when it should have cited 1003.02(e).

[7] The board mistakenly cited Per-A 207.12(b)(2) when it should have cited Per-A 207.12(d)(1). It makes no difference if the board cited the wrong rule, because the outcome would be the same. The Board noted the error in its order that denied the motion for rehearing. CR 148.

SUMMARY OF THE ARGUMENT

This appeal is based on the Division's belief that it did not violate the *N.H. Admin R.* Per 1003, and that the PAB incorrectly interpreted and applied the rule when it reinstated Tpr. Call to his former position as a State Trooper.

First, the PAB correctly interpreted and applied *N.H. Admin R.* Per 1003 when it held that Tpr. Call's treatment providers were responsive to the Division's request and deemed him to be able to perform the essential functions of his job. The Board heard a full day's testimony and received numerous pieces of evidence in the form of medical documentation that clearly established that Tpr. Call's treatment providers all came to the same conclusion, which was that Tpr. Call was fit for full unrestricted duty. Furthermore, the PAB did not err or abuse its discretion when it aggregated the medial records and found them to be responsive pursuant to *N.H. Admin R.* Per 1003.02. As such, the medical evidence and documentation were not merely conclusory in nature, but were reasonable and customary responses to the Division's inquiries. The Division in its inquiry only requested an assessment of Tpr. Call in regards to his physical and mental ability to perform the essential functions of a State Trooper. There was evidence in the record that Tpr. Call's medical providers reviewed his job description and other factors when they cleared him to return to duty. Therefore, the PAB did not err or abuse its discretion when it determined that Tpr. Call's treatment providers were

responsive. Which only follows that the PAB was correct in determining that the Division was not entitled to request an Independent Medical Examination pursuant to *N.H. Admin R.* Per 1003.02(e), and as such violated the rules. Again, the PAB did not commit any errors of law, nor did it abuse its discretion. The PAB has broad authority under RSA 21-I:58 to interpret its rules, and to make such orders at it may deem just.

Second, the PAB did not exceed its statutory authority in fashioning its remedy. RSA 21-I:58 authorizes the PAB to reinstate an employee, change, or modify an order of the appointing authority or make such order as it may deem just. The PAB crafted a remedy that, in its discretion, was not only beneficial for the Division, but also beneficial for Tpr. Call. Furthermore, even if the remedy exceeds the PAB's authority, reinstatement does not exceed that authority. The PAB *shall* reinstate an employee if the PAB determines that the appointing authority violated one of the *N.H. Admin. Rules*. However, the PAB is also vested with discretion to determine whether to grant relief and how to craft that relief, so it *may* reinstate an employee if it determined that reinstatement is just. Either way, the order to reinstate Tpr. Call is valid and well within the authority of the PAB.

STANDARD OF REVIEW

A review of a PAB decision is governed by both statute and case law. A review of the PAB's decision is governed by RSA 541:13 (2007). Appeal of Morton, 158 N.H. 76, 78 (2008). As the appealing party, the Division has the burden to show that the PAB's decision "is clearly unreasonable or unlawful." Appeal of N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 266-267 (2018). The PAB's findings of fact are deemed to be *prima facie* lawful and reasonable. Appeal of Alexander, 163 N.H. 397, 401 (2012). The Supreme Court will not vacate or set aside the PAB's decision except for errors of law, unless they are satisfied, by a clear preponderance of the evidence before them, that such order is unjust or unreasonable. Id. at 401. However, the Supreme Court does review the PAB's interpretations of statutes and administrative rules *de novo*. Id. at 401. When interpreting both statutes and administrative rules, the plain and ordinary meanings of words are used, looking at the rule or statutory scheme as a whole, and not piecemeal. Appeal of Morton, 158 N.H. at 78.

RSA 21-I:58 establishes two categories of relief a permanent employee may receive from the PAB: one mandatory and one discretionary. See Appeal of Rowan, 142 N.H. 67, 71 (1997). First, the statute provides that, if the action complained of was taken by the appointing authority for an impermissible purpose, or violated a statute or applicable administrative rule, the PAB "shall" reinstate the employee to his or her former position, or a like position. Second, the statute

provides that, in all appeals that do not warrant mandatory reinstatement under the above criteria, the PAB is vested with discretion to determine whether to grant relief and how to craft that relief. Appeal of N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 267 (2018).

ARGUMENT

I. THE BOARD CORRECTLY HELD THAT THE TREATMENT PROVIDERS' STATEMENTS WERE ADEDQUATELY RESPONSIVE.

A. The PAB correctly determined that the Appellee's treatment providers' statements were adequately responsive.

The Division mischaracterizes that the PAB committed an error of law when it, as the Division believes, interpreted *N.H. Admin R.* Per 1003.02(a)(1) to require only conclusory statements that the employee is fit to return to work. The Division believes that Tpr. Call's healthcare practitioners were unresponsive to the Division's request for an assessment of Tpr. Call's ability to perform the essential functions of a State Trooper and return to duty. *N.H. Admin R.* Per 1003.02(a)(1) Request for Assessment Information states:

> 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.

The PAB did not commit error when it applied *N.H. Admin R.* Per 1003.02, because it followed the common sense meaning of the rule as a whole. When interpreting statutes and administrative rules, it "requires statutory interpretation, our review is *de novo.* Carr v. Town of New London, 170 N.H. 753, 756, (2017). (Citations omitted). In matters of statutory interpretation, we are the final arbiters of legislative intent as expressed in the words of the statute considered as a whole. Id. We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. Id. Our goal is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme. Carr v. Town of New London, 170 N.H. at 756.

Not one, but four of Tpr. Call's treating healthcare practitioners responded to the Division's inquiry into the physical and mental health status of Tpr. Call in one form or another. Furthermore, two of those healthcare practitioners were medical doctors, one of whom was Tpr. Call's primary care physician. The other medical doctor was his psychiatrist that he was seeing weekly, who worked for McLean Hospital in Massachusetts, which is a world-renowned medical facility for mental health and substance abuse treatment.

In the case at hand, the Division took the proper steps initially pursuant to *N.H. Admin R.* Per 1003.02(a)(1) when it requested medical documentation from Tpr. Call's healthcare practitioners in order to determine if he was fit for duty and could perform the essential functions of the position of State Trooper. The Division requested written authorization from Tpr. Call to seek the written assessments of his condition, which Tpr. Call provided without hesitation on September 13, 2019. The Division then sent Tpr. Call's four treating healthcare practitioners a request for assessment, said request included Tpr. Call's class specification, supplemental job description, work schedule, and a description of the work location and environment.

Tpr. Call's healthcare providers were responsive to the Division's request for assessments. Tpr. Call's treating psychiatrist, Geoffrey Zhi-Je Liu, MD, provided his assessment on September 29, 2019 with a letter that stated in part, "As of this time of evaluation, it is my best judgment based on the current information that there is no psychiatric contradiction to Trooper Call returning to full unrestricted duty as of the date of this letter, pending continued attendance in weekly individual therapy and adherence to psychopharmacology appointments." Dr. Liu also completed the Division's Fitness for Duty Certification, which stated that Tpr. Call could return to full, unrestricted duty effective September 25, 2019. Furthermore, Dr. Liu wrote on the last page of the supplemental job description, "Duties reviewed with patient, and please see my attached...." This would seem

to indicate that Dr. Liu reviewed Tpr. Call's supplemental job description and had an extensive conversation and evaluation of Tpr. Call's ability to return to duty. Tpr. Call testified at the hearing that Dr. Liu's review was extensive. Dr. Liu also completed the Division's Fitness for Duty Certification form, and he even included his opinion on his own letterhead. It is hard to imagine that Dr. Liu could be anymore responsive to the Division than he had when he returned the documentation to the Division. Tpr. Call also testified during the hearing that his healthcare practitioners were frustrated with the Division, because they did not know what more the Division wanted from them in order to clear Tpr. Call to return to duty. TR 458-461.

On or about October 8, 2019, Tpr. Call's primary care physician, Ray Wilt DO, responded to the Division's request with his opinion on his own letterhead, which stated, "Eric Call has been a patient of the Barrington Family Practice for the past few years. He is physically, and mentally able to perform the essential functions of his position as a New Hampshire state police trooper. He has been seen recently and is keeping his appointments." This letter to the Division was in response to the Division's inquiry, which provided Dr. Wilt with the job classification, supplemental job description, work schedule, work location, and work environment to review. Therefore, Dr. Wilt was also responsive to the Division's request for a medical assessment. Dr. Wilt had also previously provided

a completed Fitness for Duty Certification to the Division on August 15, 2019 stating that Tpr. Call could return to full, unrestricted duty as of August 15, 2019.

On or about October 12, 2019, Tpr. Call's healthcare practitioner that prescribed his medications, Sandi Moore-Beinoras, MSN, PMH-APRN, also responded to the Division's inquiry. She completed a thorough assessment of Tpr. Call's status with her from the time he became a patient in July of 2019 until the date of the letter. She discussed his sobriety, medication, and therapy with another counselor. The Division asserts that she wrote a more descriptive letter, but that she did not clear him for duty. In her documentation, she did not indicate any reason why Tpr. Call could not return to full duty. She states in the letter, "He reported no symptoms that would impede his ability to do his job and we discussed the pros and cons of a day shift versus a night shift." Again, this would seem to indicate that this medical practitioner went through the documents provided by the Division and discussed them with Tpr. Call. Therefore, Ms. Moore-Beinoras, was also responsive to the Division's request for a medical assessment. Ms. Moore-Beinoras went further and sent a follow-up letter to the Division on November 17, 2019, which stated that she met with Tpr. Call, and further stated in part, "He felt his symptoms were in remission and when we reviewed his job, he denied there were any issues that would impede his ability to return to work and perform duties assigned professionally and safely." She had also completed the Division's Fitness for Duty Certification back on July 19, 2019 stating that Tpr. Call could return to

full, unrestricted duty effective that date. Tpr. Call also testified that she was frustrated with the Division, which is why she sent the follow up letter on November 17, 2019.

Finally, Tpr. Call's therapist, Lynne Towle, LCMHC, MLADC, sent a rather lengthy letter to the Division detailing Tpr. Call's progress. Towards the end of the letter, Ms. Towle stated, "Eric is aware that this agency does not allow me to sign off on the forms needed by the State of New Hampshire and understands our rationale, it is policy, not specific to any concerns that I have about Eric." Here, Ms. Towle is stating that she can not sign off on Tpr. Call's return to duty. She further notes that he terminated treatment with her, because he was transferred to an outpatient program for individual and group therapies provided weekly at McLean Hospital, which would be under the care of Dr. Liu.

In summary, the Division provided documents to be reviewed by each of the treating medical providers (class specification, supplemental job description, work schedule, work location, work environment, and authorization for release), and all four of the healthcare practitioners provided a response to the Division. Three of the healthcare practitioners completed the Division's Fitness for Duty Certification form, which just required the practitioners to check off a box and sign his/her name to the form. All three practitioners checked off the box that stated that Tpr. Call could return to full, unrestricted duty. Furthermore, all four healthcare practitioners provided written documentation in the form of opinions on letterhead

essentially clearing Tpr. Call to return to duty. Therefore, Tpr. Call's medical providers were responsive under N.H. Admin R. Per 1003.02(a)(1). They responded to the Division's inquiries with more than just the customary checked box and signature. The Division just did not like the response it received, so it found an IME that was willing to provide the response that it wanted.

B. The PAB did not commit any errors of law or abused its discretion when it concluded that the State violated N.H. Admin R. Per 1003.02(e) and should not even have requested an independent medical examination.

The Division then argues that the PAB 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 1003.02(e) states:

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

Colonel Nathan Noyes testified that he relied upon the independent medical examination conducted by Eric G. Mart, Ph.D in making his employment decision. The Colonel indicated during testimony that Dr. Mart's report was much more comprehensive. TR 393-394. Although this case is not a workers compensation case, the theory that the PAB should give more weight to a treating physician than to an IME still holds true here. This Honorable Court has stated in the *Appeal of Kehoe*, "Because a claimant's treating physicians have great familiarity with [her]

condition, their reports must be accorded substantial weight." Appeal of Kehoe, 141 N.H. 412, 417 (1996). In the *Appeal of Morin*, this Honorable court stated, "Treating physicians are especially important in a workers' compensation case: because a claimant's treating physicians have great familiarity with his condition, their reports must be accorded substantial weight." Appeal of Morin, 140 N.H. 515, 519, (1995). (citations omitted).

Tpr. Call's treating physicians have much more familiarity with him than the IME does, even with the IME spending several hours with him. Tpr. Call's treating physicians have spent countless hours with him over the course of several years in the case of his primary care physician and over the course of several months with his psychiatrist. Furthermore, his psychiatrist was spending an hour a week with him. To expect treating healthcare practitioners to complete an eleven-page report clearing Tpr. Call to return to duty is simply unrealistic. These are working healthcare practitioners that have numerous patients that need attending, and they are not compensated to complete an assessment of a patient that would consist of several hours. In all reality, the Division was lucky to get more than just a checked off box and a signature stating that Tpr. Call could return to duty.

Since Tpr. Call's healthcare practitioners were adequately responsive to the Division's request for assessment then it should not even have ordered Tpr. Call to be evaluated by an independent medical examiner. The plain language of N.H. Admin R. Per 1003.02(e) states that the Division *shall* arrange for an independent

medical examination *if* the information provided by the employee's licensed healthcare practitioner's *is unresponsive*. Here, the employee's licensed healthcare practitioners were clearly responsive, so there was no need for an independent medical examination. Again, the Division simply did not like the responses it received from all four of Tpr. Call's treating healthcare practitioners, so it found the answer that it wanted with an IME.

C. The PAB did not commit an error of law or abuse of discretion when it aggregated the medical records and found them to be responsive pursuant to N.H. Admin R. Per 1003.02.

The PAB's Order was not unjust or unreasonable, to the contrary, the PAB applied common sense to its decision. "Orders or decisions of the board 'shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.' RSA 541:13 (1974); *Appeal of Kehoe,* 139 N.H. 24, 27 (1994). In reviewing the board's exercise of its discretion, we will apply the same standards as we apply to a trial court's rulings. The board, like a trial judge, has broad discretion over the conduct of its proceedings, including its hearings." See Attitash Mt. Service Co. v. Schuck, 135 N.H. 427, 430 (1992); Jamestown Mut. Ins. Co. v. Meehan, 113 N.H. 639, 641 (1973); and Appeal of Morin, 140 N.H. 515, 517-518, (1995) . The medical documentation was not conclusory, because it was reasonably responsive to the Division's request.

The Division argues in its brief that the PAB erred when it found that the reports were satisfactory in the aggregate. See CR 111. The PAB stated, "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." See CR 148. Either of the responses that the Division received from Dr. Wilt and Dr. Liu would be sufficient on its own as being responsive to the Division's request, but the PAB took the commonsense approach of taking all the responses from Tpr. Call's healthcare practitioners into consideration as a whole when it made its decision. The Division mistakenly believes that standing alone, the records upon which the PAB relied upon do not include satisfactory responses.

The Division argues in its brief that the information provided by Tpr. Call's healthcare practitioners does not "identify any specific information about Trooper Call's diagnosis, medical conditions, treatment plan, or medication." See Appellant's Brief at 36. However, the Division did not request that information in its letter to Tpr. Call's medical providers. The letter simply states, "The Department of Safety is requesting an assessment of your patient, Eric Call, [DOB omitted], in regards to his physical or mental ability to perform the essential functions of his position as a State Police Trooper." CR at 190-220. It does not specifically ask for a diagnosis, medical condition, treatment plan, or medication. This would appear to be a normal return to duty review requested by an employer, which healthcare practitioners

routinely do by usually checking off a box and signing his/her name at the bottom of a form.

The Division next argues that the PAB should not have given any weight to a discharge summary authored by Dr. Parekh at McLean Hospital. See Appellant's brief at 37. Although the discharge summary was not in response to the Division's inquiry, it is yet another record that indicated that Tpr. Call was physically and mentally capable of returning to work. This demonstrates that the PAB took the time to review the records in their entirety and based its decision on the totality of the circumstances and evidence that was before it. However, the PAB did not base its decision solely on Dr. Parekh's discharge summary, but it took it into consideration, which is not unjust or unreasonable.

There was no evidence in the record that any of Tpr. Call's issues manifested themselves in the course of his duty as a State Trooper. All the incidents for which he sought help was when he was in an off-duty capacity. He did what was asked him by his healthcare practitioners, and he worked hard to become both physically and mentally stable so that he could return to work. He was responsive to the Division with whatever Human Resources asked of him, but he is unable to control how his healthcare practitioners respond to the Division.

Tpr. Call's healthcare practitioners cleared him to return to full unrestricted duty, and they submitted the requested information to the Division. They were responsive to the requests and even reviewed the essential functions of a State

Trooper with their client. There was no need for an IME. Therefore, the PAB decision in this matter was just and/or reasonable in light of the facts in evidence.

II. THE BOARD DID NOT EXCEED ITS STATUTORY AUTHORITY IN FASHIONING ITS REMEDIES.

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

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

> ...If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, gender identity, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. "Any other source" shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period. In all cases, the personnel appeals board **may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.** (emphasis added)
>
> II. Any action or decision taken or made under this section shall be subject to rehearing and appeal as provided in RSA 541.
>
> III. In the event of an appeal from a decision of the personnel appeals board in accordance with the provisions of RSA 541, the fee for the copy of the record and such testimony and exhibits as shall

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

Resolution of this petition requires statutory interpretation, which is a question of law that the Court reviews *de novo*. Hudson v. Director, N.H. Div. of Motor Vehicles, 155 N.H. 197, 198 (2007) "We are the final arbitrator of the intent of the legislature as expressed in the words of a statute considered as a whole." McDonald v. Town of Effingham Zoning Bd. Of Adjustment, 152 N.H. 171, 174 (2005) (quotation omitted). "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008) "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We interpret a statute in the context of the overall statutory scheme and not in isolation." Id. (citation omitted) "When a statute's language is plain and unambiguous, we need not look beyond it for further indications of legislative intent." Appeal of Garrison Place Real Estate Inv. Trust, 159 N.H. 539, 542 (2009).

The PAB has discretion to "reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may

deem just." RSA 21-I:58, I; Appeal of N.H. Div. of State Police, 171 N.H. 262, 267 (2018) "[T]he PAB is vested with discretion to determine whether to grant relief and how to craft that relief. Our review of the PAB's decision is governed by RSA 541:13. Id. at 266. We treat the PAB's findings of fact as *prima facie* lawful and reasonable. RSA 541:13 (2021). We will not vacate or set aside the PAB's decision except for errors of law, unless we are satisfied, by a preponderance of evidence before us, that such order is unjust or unreasonable. Id at 266; *see* RSA 541:13. In reviewing the PAB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but rather to determine whether its findings are supported by competent evidence in the record." Appeal of Silva, 172 N.H. 183, 186 (2019).Appeal of N.H. Div. of State Police, slip opinion 2022.

The PAB properly applied their standard and found that the PAB voted unanimously to GRANT the appeal with reasonable restrictions, and in its decision stated, "The Board found the appellant to be credible and on the right path to recovery with almost two years of sobriety at this point. The board invokes its broad authority under RSA 21-A:58, I to tailor the following decision to fit the circumstances of this case." CR at 91. The PAB properly applied the standards set forth in their rules and regulations, codified in Per-A 207.12(d).

Neither RSA 21-I:58, I, nor the applicable administrative rules limit the authority of the PAB to reinstate only in situations in which the employee did not

commit a terminable offense. Rather, RSA 21-I:58, I, states that "[i]n *all* cases, the [PAB] 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." Therefore, the PAB acted within its authority when it reinstated the petitioner after concluding that "the [Division's] decision to dismiss the [petitioner] was unjust in light of the facts in evidence." Appeal of the N.H. Div. of State Police N.H. Pers. Appeals Bd., 171 N.H. 262, 268-269 (2018).

The PAB did not commit an error of law or abuse its discretion when it concluded that Tpr. Call satisfied his burden of proof and established by a preponderance of the evidence that the State violated N.H. Admin R. Per 1003.02(e) and that he is fit for return to full unrestricted duty based on the totality of the medical evidence. Therefore, the PAB did not abuse its discretion or err as a matter of law when it reinstated Tpr. Call to his former position as a Trooper I with the State Police. They received numerous exhibits and heard a days' worth of testimony from several witnesses to include Tpr. Call, and they properly concluded that his non-disciplinary termination was unlawful because the Division misapplied Rule 1003.02(e).

CONCLUSION

For the foregoing reasons, the Appellee requests that this Honorable Court affirm the judgement of the PAB that will reinstate Trooper Call to duty with the New Hampshire Department of Safety, Division of State Police.

REQUEST FOR ORAL ARGUMENT

The Appellee requests a fifteen-minute oral argument presented by Marc G. Beaudoin, Esq. before this Honorable Court.

Respectfully submitted,

February 25, 2022

Trooper Eric Call
By and through his attorneys
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CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original Brief of the Appellee has been uploaded to the Supreme Court electronic filing system on this 25th day of February 2022.

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

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

CERTIFICATE OF SERVICE

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that opposing counsel, Jessica A. King, Esq. of the New Hampshire Attorney General's Office, has been copied on the Supreme Court filing system.

February 25, 2022

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