

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2022 TERM

DOCKET NO. 2021-0511

CITY OF PORTSMOUTH, NEW HAMPSHIRE POLICE COMMISSION/POLICE
DEPARTMENT

v.

PORTSMOUTH RANKING OFFICERS ASSOCIATION, NEPBA LOCAL 220

RULE 7 MANDATORY APPEAL
FROM THE NEW HAMPSHIRE SUPERIOR COURT, ROCKINGHAM COUNTY
CASE NO. 218-2019-CV-01397

BRIEF OF THE APPELLANT, CITY OF PORTSMOUTH, NEW HAMPSHIRE
POLICE COMMISSION/POLICE DEPARTMENT

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Fifteen (15) minutes of oral argument is
requested, to be presented by Thomas M.
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STATUTES

NH RSA 542:8	4, 12, 15, 16, 24
NH RSA 542:10	4, 13, 15, 24

TEXT OF RELEVANT STATUTES

NH RSA 542:8 Jurisdiction of Court to Confirm, Modify, or Vacate Award. – At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.

Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may in its discretion, direct a rehearing by the arbitrators or by new arbitrators appointed by the court.

NH RSA 542:10 Appeal. – An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award as in the case of appeals from the superior to the supreme court.

QUESTION PRESENTED FOR REVIEW

[Appendix, Volume I at pages 6, 14 and 17 (hereinafter cited as “Apx. __ at __”)]

Did Arbitrator Bonnie J. McSpiritt commit plain mistake when she awarded former Portsmouth Police Officer Aaron Goodwin back pay and benefits beyond August 20, 2015, the date that New Hampshire Probate Court Judge Gary Cassavechia issued his decision in Estate of Geraldine W. Webber?

STATEMENT OF THE CASE

A sordid dispute forms the backdrop for this appeal. A dispute that played out dramatically in both a New Hampshire probate court and in local newspapers. A dispute that not only generated costly litigation, but ruined careers, and irreparably damaged the public's trust in the Portsmouth Police Department. Now, in what is hopefully the final act of this tragedy, the City of Portsmouth Police Commission/Police Department seeks to prevent the principal protagonist from reaping a financial windfall to which he is not entitled.

STATEMENT OF FACTS

1. Aaron Goodwin (“Goodwin”) is a former sworn Police Officer who was employed by the City of Portsmouth, New Hampshire Police Department (“the City”). Apx. II at 4.
2. The City terminated Goodwin’s employment on June 24, 2015. Apx. II at 7.
3. The late Geraldine W. Webber (“Ms. Webber”) was a long-time resident of Portsmouth. During the later years of her life, Ms. Webber, a widow, lived alone in a large, expensive, waterfront house. Apx. I at 53.
4. Goodwin first met Ms. Webber on October 20, 2010, while he was on duty working for the City. At the time of their first meeting, Ms. Webber was 92 years old. Apx. I at 53, 66; Apx. II at 4.
5. On Christmas Eve 2010, a few weeks after their first meeting, Ms. Webber told Goodwin that when she died, she wanted to leave him her house. Apx. I at 68.
6. A few days later, Ms. Webber told Goodwin that when she died, she also wanted to leave him the contents of her house. Apx. I at 68.
7. Eventually, with Goodwin’s help, Ms. Webber had her existing estate planning documents revised to leave Goodwin not only her house and its contents, but her car and a portfolio of stocks. Apx. I at 68; Apx. II at 5.
8. Within just a few months of meeting Ms. Webber, Goodwin inserted himself into nearly every facet of the elderly widow’s life. Apx. II at 5.
9. Goodwin helped Ms. Webber shop around for a lawyer to prepare new estate planning documents that would leave Goodwin the bulk of Ms. Webber’s fortune, valued over two million dollars. Apx. I at 53, 68, 71 and 94.
10. Goodwin managed Ms. Webber’s medical care. Apx. I at 91-95; Apx. II at 5.

11. Goodwin assisted Ms. Webber with her finances and her banking. Apx. I at 91-95; Apx. II at 5.

12. Goodwin's level of control over Ms. Webber's life peaked on December 8, 2011, when he was appointed her Power of Attorney. Apx. II at 5 and 38.

13. Ms. Webber passed away a year later, on December 11, 2012, just prior to her 94th birthday. Apx. I at 53; Apx. II at 6.

14. With the subsequent disclosure of Ms. Webber's recently revised estate planning documents, litigation ensued in the New Hampshire Probate Court before Judge Gary Cassavechia. Ms. Webber's previous beneficiaries (including her only living heir, a disabled grandson) accused Goodwin of exerting undue influence over Ms. Webber to secure his significant bequest. Apx. I at 37.

15. As the Probate Court litigation proceeded through discovery and toward trial, tales of the Goodwin-Webber relationship became daily fodder for the local newspapers. Apx. II at 39.

16. Numerous newspaper articles about the Goodwin-Webber relationship appeared. These articles were highly critical not only of Goodwin, but also of the Portsmouth Police Department's Command Staff for failing to prevent Goodwin's potentially lucrative relationship with the elderly Ms. Webber. Apx. II at 39.

17. To obtain an unbiased, independent review of the propriety of the Goodwin-Webber relationship, the Portsmouth Police Commission convened a three-person Task Group, led by local attorney and former New Hampshire District Court Judge Stephen Roberts, and including former Police Chief William Baker and Dr. Kathy Lynch. Apx. II at 6 and 42.

18. The Task Group conducted an extensive investigation into the Goodwin-Webber relationship which included fifty-eight (58) witness interviews and review of tens of thousands of pages of documents. Apx. II at 42.

19. On June 1, 2015, the Task Group issued its twenty-six (26) page written report. In deference to the ongoing Probate Court litigation, the Task Group

declined to address either Ms. Webber's mental capacity, or specific allegations about Goodwin's exercise of undue influence over Ms. Webber. Apx. II at 13, 14 and 58.

20. Nevertheless, in its written report, the Task Group concluded that in pursuing his relationship with Ms. Webber, Goodwin violated three separate Rules and Regulations of the Department, and one City of Portsmouth Ordinance:

1. *Rules and Regulations 50.01A: Acceptance or Solicitation of Gifts, Rewards, and Other Gratuities.*
2. *Rules and Regulations 52.27: Conduct, whether on or off duty, tending to cause disrespect or disrepute on the department.*
3. *Rules and Regulations 52.30: Any other act or omission contrary to good order and discipline.*
4. *City Ordinance 1.802 Sections A, F, and I by engaging in a transaction involving a financial and private interest that was in conflict with his official duties; by accepting a gift or promise of something of value at more than \$100.*

Apx. II at 43 and 49.¹

21. In response to the Task Group's written report, on June 24, 2015, the City terminated Goodwin's employment as a sworn Police Officer. Apx. II at 5 and 43.

22. [Apx. I at 12 and 22] As part of the termination process, the Union and Goodwin waived their right to a pre-disciplinary hearing. Specifically, on June 24, 2015, the Union and Goodwin executed a written agreement with the City that provided as follows:

¹ To its credit, the Task Force also concluded that the Portsmouth Police Department's Command Staff shared in the blame for neither preventing, nor putting a quick end to the Goodwin-Webber relationship.

The Union and the Employee waive any right to a pre-disciplinary hearing, and they waive any right to a hearing (as required by the parties' collective bargaining agreement) before either the Chief of Police or the Police Commission.

The parties agree that this matter will be submitted to arbitration, as per the terms of the parties' collective bargaining agreement. The parties further agree that in bypassing a pre-disciplinary hearing and hearings before the Chief of Police and the Police Commission, none of the parties is waiving any arguments that could have been raised at such hearing(s).

23. The Union timely grieved Goodwin's termination under the terms of its collective bargaining agreement with the City. In its grievance, the Union sought Goodwin's reinstatement. Apx. II at 7.

24. Consistent with the terms of the parties' CBA and the parties' June 24, 2015 written agreement referenced in ¶22 above, the grievance proceeded directly to arbitration before a mutually agreed upon arbitrator, Bonnie J. McSpiritt ("Arbitrator McSpiritt"). Apx. II at 3.

25. On August 20, 2015, approximately two months after Goodwin's employment was terminated, and while the Union's grievance challenging that termination was still in its infancy, New Hampshire Probate Court Judge Cassavechia issued his sixty-three (63) page decision in Estate of Geraldine W. Webber, Case Number 318-2012-ET-01509 ("the Cassavechia Decision"). Apx. I at 37.

26. Judge Cassavechia, relying primarily on the sworn trial testimony of Ms. Webber's personal physician, Ira Schwartz, ruled that prior to and throughout her brief relationship with Goodwin, Ms. Webber suffered from increasingly severe cognitive impairment, dementia (most likely Alzheimer's type), confusion and lack of judgment. Apx. I at 57-59.

27. Judge Cassavechia also ruled that the 2012 estate planning documents

that Goodwin helped Ms. Webber obtain had to be “invalidated as the product of undue influence exerted by Officer Goodwin.” As Judge Cassevechia succinctly and damningly summarized,

...it is uncontroverted that Officer Goodwin stood in a confidential relationship with Ms. Webber, procured legal counsel for her for the purposes [of] preparation and execution of the Estate Planning Documents, and was the beneficiary of the vast majority of the lifetime assets accumulated by a ninety-three (93) year-old woman he had only known for the final twenty-six (26) months of her life.

Apx. I at 89.

28. Judge Cassavechia also pointedly described Goodwin’s sworn trial testimony in the Probate Court as not only “often evasive, sometime dubious” but also hampered by Goodwin’s “selective memory.” Apx. I at 73 and 95.

29. With the issuance of the Cassavechia Decision, as of August 20, 2015, there was now a written finding, by a New Hampshire Court, that while working as a sworn Police Officer in the Portsmouth Police Department, Goodwin exerted undue influence over a cognitively impaired 90+ year old widow, resulting in an attempted multi-million-dollar bequest to his benefit.

30. The Cassavechia Decision was never appealed. Apx. II at 87.

31. On June 20, 2016, approximately three (3) months prior to the first in a series of evidentiary hearing days in the arbitration between the City and the Union, the City provided the Union with written notice that it intended to rely on the Cassavechia Decision both as support for its termination decision, as well as to limit the scope of any remedy awarded to Goodwin. Apx. II at 25.

32. On January 13, 2017, in the first of her three (3) written decisions issued during the arbitration (“the Evidentiary Award”), Arbitrator McSpirtt ruled that she would accept the Cassavechia Decision into evidence in the arbitration, but that she would only consider it if/when she reached a remedy phase. Apx. II at 27.

33. On August 7, 2017, in the second of her three (3) written decisions issued during the arbitration (“the Termination Award”), Arbitrator McSpiritt ruled that on June 24, 2015, when the City terminated Goodwin’s employment based on the Task Group report, the City did not have just cause to do so. Apx. II at 63.

34. On October 22, 2018, in the third of her three (3) written decisions issued during the arbitration (“the Remedy Award”), Arbitrator McSpiritt reiterated her earlier finding that on June 24, 2015, the City did not have just cause to fire Goodwin. Arbitrator McSpiritt further ruled, however, that Goodwin’s termination was justified just two (2) months later, on August 20, 2015, when the Cassavechia Decision was issued, revealing to the City and its citizens just how improper the Goodwin-Webber relationship really was, given Ms. Webber’s cognitive impairment and the lengths to which Goodwin went to secure his significant bequest. Apx. II at 122-126.

35. In her Remedy Award, Arbitrator McSpiritt correctly ruled that in the face of the Cassavechia Decision, Goodwin could not be reinstated as a sworn Police Officer with the Portsmouth Police Department. Inexplicably, however, Arbitrator McSpiritt then incorrectly ruled that

[t]he Grievant shall receive full back pay and benefits from the date of his wrongful discharge – June 24, 2015 to when the Termination Award was issued or August 7, 2017 minus any compensation, benefits and/or unemployment received during the same period of time.

Apx. II at 125-126.

36. In other words, although Arbitrator McSpiritt correctly ruled that the City was justified in terminating Goodwin’s employment on August 20, 2015, she incorrectly awarded Goodwin back pay and benefits spanning two (2) additional years, to August 7, 2017, the date of her Termination Award. Apx. II at 125-126.

37. Pursuant to the provisions of NH RSA 542:8, on February 18, 2020, the City timely appealed Arbitrator McSpiritt’s Remedy Award to the Rockingham County Superior Court.

38. [Apx. I at 4] Rockingham County Superior Court (Judge Martin P. Honigberg) accepted extensive briefs from both the City and the Union and heard oral argument on the City's appeal on June 3, 2020.

39. On October 4, 2021, Judge Honigberg issued his Order, stating that he could not "...find a 'plain mistake' of fact or law that would justify doing anything other than confirming the arbitrator's decision in full." Apx. I at 3.

40. On November 1, 2021, pursuant to the provisions of NH RSA 542:10 and New Hampshire Supreme Court Rule 7, the City timely appealed Judge Honigberg's Order to this Court.

41. As discussed more fully below, and as previously argued to Superior Court Judge Honigberg, Arbitrator McSpiritt's award of back pay and benefits to Goodwin beyond August 20, 2015 (the date the Cassavechia Decision was issued) is directly inconsistent with settled precedent from both the United States Supreme Court and the New Hampshire Supreme Court on the after-acquired evidence doctrine. As such, contrary to Judge Honigberg's Order, Arbitrator McSpiritt's Remedy Award is fatally tainted with plain mistake and must be corrected.

42. Specifically, the City respectfully submits that as a matter of law, based on proper application of the controlling after-acquired evidenced doctrine, Goodwin is entitled to an award of back pay and benefits limited to the approximately two (2) month period from the date of Goodwin's termination (June 24, 2015) to the date the Cassavechia Decision was issued (August 20, 2015). Arbitrator McSpiritt committed plain mistake by instead awarding Goodwin back pay and benefits covering the nearly twenty-six (26) month period from the date of Goodwin's termination (June 24, 2015) to August 7, 2017, the date of her Termination Award.

SUMMARY OF THE CITY'S ARGUMENT

The City still fervently believes that it had just cause to terminate Goodwin's employment on June 24, 2015, two (2) months prior to the issuance of the Cassavechia Decision. However, the City recognizes that after an extensive arbitration, Arbitrator McSpiritt disagreed. Faced with a sharply uphill fight to overturn Arbitrator McSpiritt's decision that just cause for Goodwin's termination did not yet exist on June 24, 2015, the City has reluctantly decided to concede that portion of the battle.

Fortunately, Arbitrator McSpiritt also ruled that a mere two (2) months later, on August 20, 2015, with the issuance of the Cassavechia Decision and the disclosure of just how improper the Goodwin-Webber relationship really was, the City was justified in terminating Goodwin's employment. Inexplicably, however, Arbitrator McSpiritt then failed to apply the controlling after-acquired evidence doctrine properly, resulting in a fatally flawed Remedy Award to Goodwin of twenty-six (26) months of back pay and benefits, instead of just two (2) months of back pay and benefits. In this regard, Arbitrator McSpiritt's Remedy Award is plagued by a plain mistake that the City respectfully submits this Court is now statutorily obliged to correct.

STANDARD OF REVIEW

Both the City's initial appeal to the Rockingham County Superior Court, as well as the present appeal, are contractually authorized by the controlling CBA between the City and the Union. Specifically, the parties' CBA includes the following Article 35(E), Section 7:

[t]he arbitration provisions of this Section shall be subject to the provisions of RSA 542 Arbitration of Disputes.

In relevant part, NH RSA 542:8 provides that:

At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.

NH RSA 542:10 likewise provides that:

An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award as in the case of appeals from the superior to the supreme court.

Under the provisions of NH RSA 542, the burden of proving that an arbitrator committed a plain mistake of fact is, admittedly, a heavy one. As this Court has previously held, however, the words "plain mistake" in NH RSA 542:8 "refer both to mistakes of fact and mistakes of law." N.H. Ins. Co. v. Bell, 121 N.H. 127, 129 (1981); Finn v. Ballentine Partners, LLC, 169 N.H. 128, 145 (2016); Walsh v. Amica Mut. Ins. Co., 141 N.H. 374, 375 (1996); and Flood v. Caron, 122 N.H. 60, 62 (1982).

According to this Court, "although judicial review is deferential, it is the court's task to determine whether the arbitrators were plainly mistaken in their application of law to the specific facts and circumstances of the dispute they were called upon to decide."

Finn, 169 N.H. at 146. This Court has held that plain mistake exists where, as in this case, the arbitrator “clearly misapplied the law to the facts.” Id. This Court has further held that NH RSA 542:8 compels the reversal of an arbitration award even when the arbitrator’s error of law was “not so obvious as to satisfy the literal meaning of [definition of plain mistake]. Indeed, we have found plain mistake in circumstances where the correct legal analysis was presented to the arbitrator(s) but was rejected.” Finn, 169 N.H. at 145.

In this case, the City presented Arbitrator McSpiritt with the correct legal analysis to craft her remedy – application of the after-acquired evidence doctrine to cap Goodwin’s remedy on August 20, 2015, the date that the Cassavechia Decision was issued. Arbitrator McSpiritt either rejected or misapplied the correct legal analysis supplied by the City, resulting in plain mistake.

ARGUMENT

I. The After-Acquired Evidence Doctrine Governs The Appropriate Remedy In This Employment Termination Case.

In its landmark decision in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), the United States Supreme Court adopted the after-acquired evidence doctrine and attached it to the remedy phase of employment termination cases like this one. Specifically, in Nashville Banner, the United States Supreme Court held that even though the defendant/employer violated federal law in its decision to terminate the plaintiff/employee's employment, the employer could rely on evidence of the employee's misconduct, discovered post-termination, to limit the employee's remedy. According to the Supreme Court,

[w]e do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.

Id. at 361-62.

The New Hampshire Supreme Court has adopted and followed Nashville Banner and the after-acquired evidence doctrine. In its decision in McDill v. Environamics Corp., 144 N.H. 635 (2000), the New Hampshire Supreme Court applied the after-acquired evidence doctrine to limit an employee's damages in a wrongful termination case. According to the New Hampshire Supreme Court, the after-acquired evidence doctrine is appropriately used

...to limit the employee's damages to the time between the wrongful termination and the time the employer discovers the misconduct, provided the fact finder concludes that the employee's misconduct was sufficient to terminate the employee.

Id. at 641; see also ACAS Acquisitions (Precitech) Inc. v Hobert, 155 N.H. 381, 399 (2007).

Both the United States Circuit Court of Appeals for the First Circuit and the United States District Court for the District of New Hampshire have also adopted Nashville Banner and have recognized the after-acquired evidence doctrine as properly limiting the plaintiff/employee's remedy in employment termination cases. See Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 382 n.14 (1st Cir. 2004) ("In such cases, the Supreme Court has held that both front and back pay are indeed cut off at the time that the defendant discovers evidence that would have led it to fire the plaintiff on legitimate grounds."); Aghamehdi v. OSRAM Sylvania, 2019 U.S. Dist. LEXIS 29157, *10-11 (D.N.H. Feb. 25, 2019); EEOC v. Freudenberg-NOK, 2009 U.S. Dist. LEXIS 33082, *3 (D.N.H. Apr. 3, 2009).

II. Proper Application Of The After-Acquired Evidence Doctrine Should Have Capped Goodwin's Remedy On August 20, 2015, The Date The Cassavechia Decision Was Issued.

Again, the New Hampshire Supreme Court has defined the after-acquired evidence doctrine as

...limit[ing] the employee's damages to the time between the wrongful termination and the time the employer discovers the misconduct, provided the fact finder concludes that the employee's misconduct was sufficient to terminate the employee.

McDill, 144 N.H. at 641. In this case, all the predicate elements necessary for application of the after-acquired evidence doctrine were clear, undisputed, and satisfied. First, according to Arbitrator McSpiritt, the wrongful termination of Goodwin's employment occurred on June 24, 2015. Second, with the subsequent issuance of the Cassavechia Decision on August 20, 2015, the City and its citizens learned just how improper the Goodwin-Webber relationship was, given the severity of Ms. Webber's cognitive

impairment and the lengths to which Goodwin went to secure his significant bequest. Third, as the City and the Union stipulated during the arbitration,

...former Police Commissioners Golumb, Cavanaugh and Lehman would testify that, had he [Officer Goodwin] not be[en] already terminated, they would have moved and voted to terminate Officer Goodwin following the issuance of the Probate Court Decision.

Apx. II at 66. Finally, Arbitrator McSpiritt (the relevant “fact-finder” in this case) concluded that the after-acquired evidence of Goodwin’s misconduct, as painstakingly detailed in the Cassavechia Decision, was so severe that it alone was cause for Officer Goodwin’s termination if the City had known of the wrongdoing at the time of the discharge. Apx. II at 122, 125.

Applying the undisputed facts in this case to the template first established by the United States Supreme Court in Nashville Banner and adopted by the New Hampshire Supreme Court as recently as its decision in McDill v. Environamics Corp., 144 N.H. 635 (2000), leads inexorably to one conclusion: as a matter of law, Goodwin’s remedy should have been capped on August 20, 2015. By extending Goodwin’s remedy an additional two (2) years, to August 7, 2017, Arbitrator McSpiritt committed a plain mistake that must now be corrected.

III. None Of The Union’s Arguments Against Application Of The After-Acquired Evidence Doctrine Have Merit.

At various points along the long and often winding path that this case has travelled to get to this stage, the Union has attempted to erect roadblocks to prevent application of the after-acquired evidence doctrine. None of the Union’s arguments have merit.

A. Application Of The After-Acquired Evidence Doctrine Would Not Have Deprived Goodwin Of His Right To Due Process.

During the arbitration, and again in the Superior Court, the Union argued that application of the after-acquired evidence doctrine would have deprived Goodwin of his right to due process. The argument has no merit.

In support of its due process argument, the Union has relied primarily on the Wisconsin Supreme Court's decision in Board of Regents v. State Personnel Comm'n, 254 Wis. 2d 148, 646 N.W.2d 759 (Wisc. 2002). In Board of Regents, the Wisconsin Supreme Court upheld an administrative tribunal's exclusion of a public employer's proffered after-acquired evidence of a public employee's misconduct during the remedy phase of an employment discharge hearing. The Wisconsin Supreme Court based its decision on the fact that the public employer sought to introduce its after-acquired evidence by surprise, at the discharge hearing, without first disclosing it to the public employee. According to the Wisconsin Supreme Court, this ambush tactic, if permitted, would have deprived the public employee of his right to due process.

By contrast, in this case, the City advised the Union of its intent to rely on the Cassavechia Decision well in advance of the first day of evidentiary hearings in the parties' arbitration. Indeed, as Arbitrator McSpiritt noted, "...the admittance of the [Cassavechia] Decision was not a surprise given that the City notified the Union three (3) months prior to the arbitration hearing on June 20, 2016 of their plan to present the [Cassavechia] Decision at the hearing." Apx. II at 25. In fact, due to the City's advance disclosure of its intent to try to introduce the Cassavechia Decision into evidence, the very first order of procedural business that Arbitrator McSpiritt took up was a lengthy and spirited legal argument between counsel on the admissibility of the Cassavechia Decision and the scope of its permitted use during the arbitration. Again, unlike the Board of Regents case, Goodwin and the Union were aware of the City's after-acquired evidence well in advance of the first day of evidentiary hearings in the parties' arbitration. As such, there was no due process violation.

B. The After-Acquired Evidence Doctrine Can Be Used Not Just To Deny Reinstatement Or To Eliminate An Award Of Front Pay.

The Union has also argued that the after-acquired evidence doctrine can only be used to deny reinstatement or to eliminate an award of front pay (i.e. alleged lost pay and benefits running forward from the date of a termination hearing). According to the Union, the after-acquired evidence doctrine cannot be used as a basis to reduce and/or to

eliminate and award of back pay (i.e. alleged lost pay and benefits running from the date of termination to the date of a termination hearing). In making this argument, the Union appears to have simply misconstrued the applicable law. See Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 382 n. 14 (1st Cir. 2004) (“In such cases, the Supreme Court has held that both front and back pay are indeed cut off at the time that the defendant discovers evidence that would have led it to fire the plaintiff on legitimate grounds.”) (emphasis added); Castle v. Rubin, 78 F.3d 654, 657 (D.C. Cir. 1996) (Interpreting Nashville Banner as permitting the denial of “...reinstatement, front pay, and full back pay based on after-acquired evidence of employee misconduct.”) (emphasis added).

C. There Are No “Extraordinary Equitable Circumstances” That Justify The Extension Of The Award Of Back Pay And Benefits To Goodwin Past August 20, 2015.

Finally, picking up on language from Nashville Banner and its progeny, the Union has argued that even if the after-acquired evidence doctrine is properly applied to the facts of this case, there are still “extraordinary equitable circumstances” that justify an award of back pay to Goodwin that extends not just past the issuance of the Cassavechia Decision, but to August 7, 2017, the date of Arbitrator McSpirtt’s Termination Award. This argument also lacks merit.

In Nashville Banner, the Supreme Court admittedly left open the possibility that “extraordinary equitable circumstances” might justify the trial court in an employment termination case, even faced with an employer’s proffer of damning after-acquired evidence of the terminated employee’s misconduct, in extending the scope of the terminated employee’s remedy. In the present case, the Union argues that such an equitable extension of Goodwin’s remedy is appropriate because Goodwin was deprived of his so-called Loudermill rights. The Union is incorrect.

In its decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the United States Supreme Court held that prior to termination, a public employee has a due process right to oral or written notice of the charges against him/her, an explanation of the employer's evidence, and an opportunity to present his/her side of the

story. As further distilled by the Loudermill Court, “notice and an opportunity to respond” are the essential requirements. Id. at 546. Goodwin received an abundance of both.

As a threshold matter, it is undisputed that the City provided both Goodwin and the Union with written notice of the charges against Goodwin, as well the Task Group’s twenty-six (26) page written report on which those charges were based. It is also undisputed that the City offered Goodwin and the Union a so-called Loudermill hearing. Goodwin and the Union declined this hearing (as was their prerogative) and the parties instead proceeded directly to arbitration. [Apx. I at 12 and 22] In fact, Goodwin and the Union declined this hearing in a formal, written agreement with the City, dated June 24, 2015, which explicitly provided:

The Union and the Employee waive any right to a pre-disciplinary hearing, and they waive any right to a hearing (as required by the parties’ collective bargaining agreement) before either the Chief of Police or the Police Commission.

The parties agree that this matter will be submitted to arbitration, as per the terms of the parties’ collective bargaining agreement. The parties further agree that in bypassing a pre-disciplinary hearing and hearings before the Chief of Police and the Police Commission, none of the parties is waiving any arguments that could have been raised at such hearing(s).

Even though Goodwin was offered, and declined a Loudermill hearing on June 24, 2015, the Union argues that two (2) months later, the City was obligated to formally “re-terminate” Goodwin based on the additional evidence outlined in the Cassavechia Decision. Further, according to the Union, this sham “re-termination” would have triggered Goodwin’s right to another Loudermill hearing. It is apparently this alleged failure by the City to offer Goodwin a second Loudermill hearing that the Union claims violated Goodwin’s right to due process and justifies Arbitrator McSpirtt’s equitable expansion of Goodwin’s Remedy Award. This argument is without merit.

As of the August 20, 2015 issuance of the Cassavechia Decision, Goodwin and the Union had already been offered, and had already voluntarily declined, a Loudermill hearing on the issue that prompted his termination – his improper relationship with Ms. Webber. The only thing that changed on August 20, 2015 was that the City was suddenly presented with significant additional evidence of just how improper the Goodwin-Webber relationship really was, further supporting the City’s earlier termination decision. Furthermore, not only were both Goodwin and the Union already keenly aware of all of this additional evidence, Goodwin was at the very heart of the Probate Court trial that generated it. In this context, to continue to protect Goodwin’s due process rights, the absolute farthest that the City had to go after the issuance of the Cassavechia Decision was to apprise Goodwin and the Union in a timely fashion, sufficiently in advance of the start of the evidentiary hearings in the parties’ arbitration, that the City intended to rely on the Cassavechia Decision both to support its prior termination decision, as well as to limit the scope of any remedy awarded to Goodwin. Again, as Arbitrator McSpirtt recognized, that is precisely what the City did, and as a result “...the admittance of the [Cassavechia] Decision was not a surprise given that the City notified the Union three (3) months prior to the arbitration hearing on June 20, 2016 of their plan to present the [Cassavechia] Decision at the hearing.” Apx. II at 25.

Based on Arbitrator McSpirtt’s decision that there was no just cause for Goodwin’s termination on June 24, 2015, but that the City was justified in terminating Goodwin’s employment on August 20, 2015, under the controlling after-acquired evidence doctrine, Goodwin is entitled to two (2) months of back pay and benefits. There is no rational basis, much less any “extraordinary equitable circumstances” that exist to justify the extension of Goodwin’s remedy even a single day past August 20, 2015. In this regard, the central tenet of Nashville Banner carries the day:

Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against

the employer and even if the information might have gone undiscovered absent the suit.

Nashville Banner, 513 U.S. at 362.

As a final point, there is nothing legally relevant about August 7, 2017, the date that Arbitrator McSpiritt picked as the endpoint for her damage analysis. More specifically, there were no “extraordinary equitable circumstances” that concluded on that date. August 7, 2017 is nothing more than the date that Arbitrator McSpiritt issued her Termination Decision. Query, if the parties’ arbitration had proceeded more quickly, would Arbitrator McSpiritt have awarded Goodwin less? In other words, unlike August 20, 2015, which even Arbitrator McSpiritt agrees is the date the City was justified in terminating Goodwin’s employment, August 7, 2017 has utterly no correlation to the underlying facts of this case or to the compensable damages suffered by Goodwin.

IV. Conclusion And Request For Relief.

For the reasons set forth above, and pursuant to the provisions of NH RSA 542:8 and NH RSA 542:10, the City respectfully requests that this Court find and rule that Arbitrator McSpiritt committed plain mistake when she awarded former Portsmouth Police Officer Aaron Goodwin back pay and benefits beyond August 20, 2015, the date that Judge Cassavechia’s Decision was issued. Further, the City requests that the City correct Arbitrator McSpiritt’s October 22, 2018 Remedy Award to provide as follows:

*Goodwin shall receive full back pay and benefits from June 24, 2015 **to August 20, 2015** minus any compensation, benefits and/or unemployment received during the same period of time.*

CERTIFICATIONS

The undersigned counsel hereby certifies that the appealed decision is appended to this brief in the Appendix.

The undersigned counsel hereby certifies that the foregoing brief conforms to New Hampshire Supreme Court Rules 26(2), (3), and (4).

The undersigned counsel hereby certifies that the foregoing brief conforms to New Hampshire Supreme Court Rules 16(11) and contains 6211 words.

The undersigned counsel hereby certifies that a copy of the foregoing brief has been properly served on opposing counsel.

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests fifteen (15) minutes of oral argument, to be presented by Thomas M. Closson.

Respectfully submitted,
City of Portsmouth, New Hampshire
Police Commission/Police Department

By its attorneys,
JACKSON LEWIS PC

Date: March 11, 2022

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