

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2022-0087

GRANITE STATE TRADE SCHOOL, LLC

v.

STATE OF NEW HAMPSHIRE MECHANICAL LICENSING BOARD

(Superior Docket No. 217-2021-CV-00218)

**RULE 7 APPEAL OF FINAL DECISION OF
THE MERRIMACK COUNTY SUPERIOR COURT**

**BRIEF OF THE PETITIONER/APPELLANT
GRANITE STATE TRADE SCHOOL, LLC**

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QUESTIONS PRESENTED

1. Is Plaintiff Granite State Trade School exempt from the audit requirements to provide confidential testing and teaching materials as “grandfathered” because it pre-existed Saf-Mec Rules 308 and 610?
2. Are Saf-Mec Rules 308 and 610 arbitrary and capricious as applied to Granite State Trade School, LLC?
3. Is the training or examination program being discontinued for Granite State Trade School contrary to N.H. Admin. R. Saf-Mec 308.03(c) and 610.02 as it was never previously required to submit confidential materials pursuant to an audit request?
4. Are the audit requirements overly burdensome?
5. Does the audit request and retention of confidential testing and technology materials warrant injunctive relief?

STATEMENT OF CASE

On December 22, 2021, the Court issued an Order dated December 21, 2021 granting the Respondent's Motion to Dismiss. That the court denied the Motion for Reconsideration on January 19, 2022.

STATEMENT OF FACTS

Petitioner Granite State Trade School LLC ("GSTS") has provided quality gas training courses continuously without issue since 2007. GSTS also provides training for Plumbing Apprenticeship, HVAC courses, Fuel Oil as well as Gas and Plumbing Continuing Education.

GSTS has a longstanding successful training record with the State of New Hampshire and is the approved NH PHCC provider for both plumbing and HVAC by the National Plumbing, Heating, Cooling Contractors Education Foundation. In fact, GSTS is the longest running approved gas training school in New Hampshire. For over 15 years GSTS has provided quality education for hundreds of students without any issues or complaints unlike some of the competitors.

It should further be noted a letter was sent to the Office of the Governor on September 15, 2020 and copied to the Mechanical Board regarding the issues herein and it was brought to their attention. That the PHCC, Educational Foundation Propane Gas Association of New England, Division of Fire and Safety from Springfield, Vermont and State of Maine's Department of Professional and Financial Regulation Office of Licensing and Registration and Maine Fuel Board do not require an audit. That PHCC, which services 30 states, responded to the audit: "We understand you have been asked to provide exam banks for your state audit. As you may know,

we are a national program with over 30 states. Unfortunately, by granting your request we will be compromising the integrity and security of the exams. We are unable to release any exams or questions for your review.”

The quality of education provided by GSTS and its proprietary education tools and materials go far beyond the scope of the Mechanical Board which has no member with any knowledge or proper educational standards. The Mechanical Board has no guidelines or protocols, just a list of material or items that they think are important.

That AFTER approximately 15 years of quality training and testing, the Respondent is now seeking for all education materials and test exams as part of their audit. GSTS considers this request voluminous and damages the integrity and security of the program, education materials and exams, which are proprietary to GSTS.

That an audit process per Saf-Mec 610 was not effective until September 20, 2017. Part of the rules under approval states in Saf-Mec 308.03 Approval at paragraph (c) as follows:

“The passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules.”

Accordingly, the GSTS program has been in effect since 2007 and pre-exists the audit rule adopted in 2017. In fact, GSTS has never been audited as is currently being requested and is grandfathered in as per Saf-Mec 610.

It further states as per Saf-Mec 308.02 Organization Approval, paragraph (a)(4)b,

“tests shall be maintained in a manner that demonstrates the highest regard for test security, including secured in a locked cabinet when not in use...”

GSTS has raised this issue before the Board and the Education Committee. GSTS offered to allow the audit to be conducted at GSTS where the materials will not leave the facility and remain secured as a compromise to the Board's request, which was accepted as a fair compromise.

That a zoom meeting was conducted with the Education Committee of the Board on December 17, 2020 it was agreed that materials could be reviewed at the GSTS facility to preserve their integrity and security of the material.

Previously the Board issued a letter on October 22, 2020 directing James Fusco and GSTS to go through the audit process and release the proprietary materials to the Board to seek approval of their curriculum, instructors, teachers, laboratory training providers, location or testing or examination questions or procedures. See Saf-Mec 610.01.

That on March 18, 2021, the Board sent James Fusco of GSTS a letter stating that the Board has reviewed his concerns about the material being secured and proprietary, stating that the material will not be subject to a "right-to-know law" and will be "secured in a locked area" in the Mechanical Licensing Board office. They then advised that the material must be submitted within thirty (30) days or they will be taking further action to remove GSTS as an approved training program and stop accepting gas training certificates and gas licensing certificates from GSTS even though GSTS is grandfathered in and pre-dates the 2015 regulation.

The Board and Committee have already rescinded their original agreement to visit the premises of GSTS to review the audited materials by meeting held by zoom on December 17, 2020 which would have resolved all concerns.

LEGAL ANALYSIS

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo

v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court “assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff.” Lamb v. Shaker Reg’l Sch. Dist., 168 N.H. 47, 49 (2015). The Court “need not, however, assume the truth of statements that are merely conclusions of law.” *Id.* “The trial court may also consider documents attached to the plaintiff’s pleadings, or documents the authenticity of which are not disputed by the parties[,] official public records[,] or documents sufficiently referred to in the complaint.” Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010). “If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss.” Graves v. Estabrook, 149 N.H. 202, 203 (2003).

Absence of a rational connection between the facts found and the choice made, Natural Resources v. U.S., 966 F.2d 1292, 97, (9th Cir. 1992), a clear error of judgment; an action not based upon consideration of relevant factors and is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. 5 USC 706(2)(A) (1988).

19.2 Am Jur.2d § 530 provides that an arbitrary or capricious act,

Ordinarily, an agency action is arbitrary or capricious if the agency has relied on factors which Congress or a state legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Mere error is insufficient for a finding of arbitrariness or capriciousness.

Other agency actions which courts hold to be arbitrary or capricious include those which...are willful and unreasoning in disregard of facts and circumstances...

The failure of an agency to abide by its rules is per se arbitrary and capricious, as is the failure of an administrative body to conform to prior procedure without adequate explanation for change. 1

20.2 *Am Jur.2d* § 531 further provides,

An agency action or decision, in order to satisfy the arbitrary or capricious standard of review, need not be ideal, but the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.

In making a factual inquiry concerning whether an agency decision was arbitrary or capricious, the reviewing court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. The inquiry must be searching and careful, and should be a substantial inquiry into the agency decisionmaking (sic) process, to enable the court to determine whether the agency decision, in the context of the record, is too unreasonable, given its statutory and factual context, for the record, is too unreasonable, given its statutory and factual context, for the law to permit it to stand. A reviewing court must also ascertain whether the agency abused its discretion by basing its decision on legally irrelevant factors, or by omitting to consider legally relevant factors, those the legislature intended the agency to consider in reaching its decision in cases like the one in question.

Saf-Mec 101.01 Purpose. The board's administrative rules set forth the organization of the mechanical licensing board, describe the board's practices and procedures, establish the licensing qualifications of fuel gas fitters and gas fitting trainees, master plumbers, journeyman plumbers,

1 See *Am Jur.2d* § 531; See *Motor Vehicle Mfrs. Asso. V. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 77 L.Ed2d 443, 103 S. Ct. 2856, 13 ELR 20672; *Greer v. Illinois Hous. Dev. Aut.*, 122 Ill 2d 462, 120 Ill Dec 531, 524 NE2d 561; and *Plaza Bank of West Port v. Board of Governors of Federal Reserve System (CA8)*, 575 F.2d 124 (8th Cir. 1978).

apprentice plumbers and the voluntary certification of water treatment technicians and oil heating technicians, establish requirements for the issuance of fuel gas fitting and plumbers' licenses and certifications for oil heating technicians and water treatment technicians, set forth continuing education requirements for the renewal of licenses and certifications, establish ethical standards for the professions governed by the board and otherwise implement the provisions of RSA 153:27 through 153:38.

Saf-Mec 103.04 Duties of the Board. The board shall:

- (a) Adopt rules as provided for in RSA 153:27 through RSA 153:38;
- (b) Implement the licensing program for RSA 153:27 through RSA 153:38 and these rules;
- (c) Review and approve education programs for licensure, certification and continuing education;
- (d) Review and approve continuing education providers and instructors for licensing and certification programs;
- (e) Conduct hearings for disciplinary actions;
- (f) Review and recommend adoptions, exceptions, or omissions to technical standards as adopted under RSA 153:28, III; and
- (g) Develop and recommend for the legislature future changes to RSA 153:27 through RSA 153:38 and these rules.

Source. #10798, *eff 3-18-15*

In the Saf-Mec 101 Purpose: states that the board "set forth continuing education requirements for the renewal of licenses and certifications.

The rules as stated require the Board to review and approve educational programs. This does not state that they are entitled to confiscate and retain proprietary materials. Rules also state that they "shall review and approve the facility" for each applicant's request to determine that the students are attending programs in an environment that shall be as comfortable as possible with

regard to temperature, light and seating arrangements. This would require a physical visit to our facility. No Board member has ever inspected our facility since our original approval in 2007.

Under the Duties of the Board:

Saf-Mec 103.04 Duties of the Board.

c) Review and approve education programs for licensure, certification and continuing education;

d) Review and approve continuing education providers and instructors for licensing and certification programs;

In the Statute 153.27-a Mechanical Licensing Board

(c) Review and approve educational programs and providers

In the statute:

153:27-a Mechanical Licensing Board. –

There is hereby established as a unit within the division of fire safety a mechanical licensing board. The term of office for the members appointed to the board shall be 3 years and until a successor is appointed. The initial appointed members of the board shall serve staggered terms. Vacancies shall be filled in the same manner and for the unexpired terms. No member of the board shall be appointed to more than 2 consecutive terms. A member of the board shall serve as the board secretary.

I. (a) No member of the board may be associated with the formal education for licensing, and/or be provider or an employee of a provider for continuing education for any profession or trade licensed under this subdivision.

Question: How does an agency that prohibits a member in education when they want to control education?

The rules as published are arbitrary and capricious due to the fact that they are not properly administered, consistent nor do they follow standard educational protocols for evaluating educational programs. The Board claims that materials submitted will be secure and not available to anyone. The Board does not handle the records. This is done by the Custodian of Records and is listed as the administrative office staff.

One section contains different information than another.

In the Saf-Mec 600 Rules in Part 610 the rules Saf-Mec 610.01 (e) Training providers are required to "Notify the board within 10 business days when a student is discharged from a licensing class for any reason including but not limited to:

1. Attendance
2. Behavior
3. Academics, or
4. Any violation of school rules or regulations; and

These rules are arbitrary as some of the information requested is personal information that affects a student's rights and goes beyond the scope of any educational or training establishment. Public schools cannot divulge some of the information requested even to a parent as it is a violation of privacy. In fact, the entire Section 610 in the rules should be discarded and completely rewritten. In the Saf-Mec as listed below:

Saf-Mec 104.02 Custodian of Records; Inspection and Copies of Records.

(a) The board's administrative office staff shall be the custodian of the board's records, and shall make available, upon request, those records which are subject to public inspection under RSA 91-A.

(b) Persons desiring to inspect or obtain copies of Board records shall identify as specifically as possible the information being sought.

(c) Persons desiring copies of board records shall pay the actual costs of copying fees as defined in RSA 91-A, and in RSA 153:28, II and these rules.

(d) If records are requested which contain both public information and information exempt from disclosure pursuant to RSA 91-A or other law, the board shall redact the information exempt from disclosure and provide the remaining information, unless otherwise ordered by a court of competent jurisdiction.

The Board staff and inspectors will have access to this material. Two of the Boards inspectors are instructors themselves at different schools. How are we to be assured that they do not access and use the materials themselves.

The rules are not being enforced as written and the security of materials are in question. During the June 2021 Board meeting the Chief Inspector asked who had the materials submitted from a different educational provider and no one on the Board, including the Chairman, had any knowledge of the whereabouts of the program materials submitted for review.

Questions went around the table and some of the members had already been replaced by new members so they surmised one of the former members had the materials.

Other areas where the Rules are not enforced properly, as no one reads the wording in the Rules:

Saf-Mec 308

308.01 Approval of Training Programs for Licensure.

(a) The mechanical licensing board shall approve all educational programs for content, continuity, and applicability toward the licensing of individuals for fuel gas fitting, domestic appliance technicians, hearth system installation and service technicians, and plumbing.

(b) If the program requires the use of a classroom, the mechanical licensing board shall review and approve the facility for each applicant's request to determine that the students are attending programs in an environment that shall be as comfortable as possible with regard to temperature, light and seating arrangements.

(c) An applicant that wants to have its training program accepted under these rules shall submit to the mechanical licensing board a short statement describing the licensing program or specialty license endorsement program for which the training program is to be evaluated, including:

- (1) The training program's curriculum;
- (2) A copy of the training program's educational material;
- (3) A statement demonstrating the method by which the subject matter will be delivered to the student;
- (4) Copies of quizzes, worksheets, handouts and chapter exams;
- (5) A statement demonstrating:
 - a. The integrity and proctoring of exams; and
 - b. The educational subject matter incorporated in the tests; and
- (6) A biography of the training program instructors that demonstrates proof of the educational and trade experience required to instruct students on the requested subject matter.

(d) Upon receipt of a request for approval of an applicant's training program, the board shall schedule a time for the applicant to provide a presentation to the board.

Source. #10648, EMERGENCY RULE, eff 7-25-14, EXPIRES: 1-21-15; ss by #10761, INTERIM, eff 1-21-15, EXPIRES: 7-20-15; ss by #10847, eff 7-1-15

Saf-Mec 308.03 Approval

308.03 Approval.

(a) The board shall review and approve a training program that meets or exceeds the educational standards specified in these rules.

(b) The board shall review and approve an examination program that meets or exceeds the standards specified in these rules.

(c) The passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules.

Source. #10648, EMERGENCY RULE, eff 7-25-14, EXPIRES: 1-21-15; ss by #10761, INTERIM, eff 1-21-15, EXPIRES: 7-20-15; ss by #10847, eff 7-1-15

ARGUMENT

The Board has simply taken a willful unreasonable approach to the audit process with complete disregard for the facts and circumstances raised by GSTS which has no satisfactory explanation.

That GSTS has raised issues with Respondent, (i) that GSTS is grandfathered and not subject to the audit process as written; (ii) training worksheets, handouts and exams created by GSTS are proprietary and considered as a security issue and should not be viewed by other competitors or other education facilities as it has taken many years for GSTS to create this proprietary information.

Per the Board's own rules, in Saf-Mec 308.03 Approval: states in paragraph (c) "the passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules".

In the 600 rules adopted in 2017 the requirements are very controlling in how an educational facility conducts its operation. Paragraphs 610.01 (b), (c), (e) and (f) are overly burdensome, arbitrary and capricious. If Bill Trombly's (Chairman) comments reflect that the process is taking too long conducting audits, then how is an educational facility to operate with the demands requested in these rules? No business should be subjected to such a recordkeeping

burden or administrative oversight. The Board cannot conduct the audits now in a timely fashion and drag out the approval process at their will.

Some of the rules we feel violate a student's rights to privacy in what the rules request to be submitted: i.e.: attendance, behavior, academics or any violation of school rules or regulations and the notification to the board within 3 business days of any licensee's or certificate holder's successful completion of any licensing program, session or licensure level. Under privacy laws even parents are not entitled to such information.

Based on the statement above and Saf-Mec 308.03 (c) GSTS is grandfathered. GSTS was approved long before the Saf-Mec rules were adopted as well as the 600 rules that were adopted in 2017 and not acted upon until 2019/2020. In fact the wording in Saf-Mec 308.01 (c) it states: "An applicant that wants to have its training program accepted under these rules shall submit to the mechanical licensing board a short statement describing the licensing program or specialty license endorsement program for which the training program is to be evaluated, including: a bullet list of 6 items to be submitted."

In 2017 GSTS did comply with the new ruling for a new course to be offered as listed in the board minutes of December 20, 2017, under education paragraph (c) we met all of the requirements of the 308.01 (c) rules including providing a Power Point presentation of the course and the board were all in favor.

That GSTS has successfully trained and educated licensees over many years and kept their proprietary tools and materials secured. It makes no sense why this standard of practice should change now.

That GSTS training and testing is grandfathered and exempt from compliance of the audit request as per Saf-mec 308.03(c) and 610 as it preexists the regulations.

That Saf-mec regulations 308 and 610 are arbitrary and capricious and unreasonable.

That the regulations fail to protect the integrity and security of the program education materials, and exams and contrary to the legislative intent.

Respectfully, the Court did not consider the historic process by the Board regarding GSTS's alleged exemption under Saf-Mec 610:02. That prior to the enactment of the law the Board approved GSTS's programs without the substantial burden of providing the exhaustive list of materials as now required by the statute every two years and the security concerns were not an issue since GSTS's maintained exclusive security over proprietary teaching and testing materials.

In essence, the requirement by the Rule contradicts the grandfather intentions of Saf-Mec 308.3 and is in fact a new application to approve any training examination programs previously approved prior to the effective date of the rules, i.e., New Hampshire Administrative Rule, Saf-Mec 308.03-c and Saf-Mec 610:02.

While it is understood that the court must take the statute/rule on its face, it is subject to modification if the statute/rule is not clear. The statutes/rules are ambiguous as applied to GSTS. Respectfully, the statute/rule states that that the State should not discontinue the approval of any training or examination program approved prior to the effective date in these rules and it may be subject to modification of the status if the statute is not clear.

GSTS is exempt from the application process due to its grandfathered status. The effect of proving the exhaustive list of confidential materials is a new deviation and new application and statute which conflicts with the statute/rule excepting GSTS from the exhaustive two year audit.

Secondly, the Safety Mechanical Board 610:02 is arbitrary and capricious to the extent that the Board is required to go to the facility of GSTS where they can conduct the order process onsite.

There is no burden to the Board to do so. In fact, the Board is required to view the facility under the rules.

While the Board has a legitimate reasonable need to review the materials in a convenient manner due to limited number of times they meet, the reviewing of the materials at the facility in a confidential environment is not inconvenient as they are required to go to the facility.

Saf-Mec 104.02 Custodian of Records; Inspection and Copies of Records, provides as follows:

(a) The board's administrative office staff shall be the custodian of the board's records, and shall make available, upon request, those records which are subject to public inspection under RSA 91-A.

(b) Persons desiring to inspect or obtain copies of board records shall identify as specifically as possible the information being sought.

(c) Persons desiring copies of board records shall pay the actual costs of copying fees as defined in RSA 91-A, and in RSA 153:28, II and these rules.

(d) If records are requested which contain both public information and information exempt from disclosure pursuant to RSA 91-A or other law, the board shall redact the information exempt from disclosure and provide the remaining information, unless otherwise ordered by a court of competent jurisdiction.

Contrary to the Board's representation that the proprietary teaching and testing materials are not subject to "the right to know" inspection, there is no statute or rule that protects the materials from public view, dissemination, as written.

Further, the rules are not equally enforced and GSTS' competitors that teach at the state run programs do not have to meet these requirements. Manchester School of Technology, Laconia Community College or Sugar River Vocational School do not have to meet these requirements. In fact, the Manchester School uses unlicensed instructors (the secretary for the Mechanical Board to teach code in the 4th year course). Whereas, GSTS is required to submit to and have teachers

approved contrary to what is practiced at state-run programs. This is a violation of the equal protection of the law and not applied fairly to everyone.

The Saf-Mec 600 Rules with regard to the auditing process are overreaching, capricious and arbitrary in their scope. The student's rights are being violated in 610.01 (e). All of this information is privileged information between the student and the educational institution.

The 610 rules that were adopted cannot be equally enforced as the Board has no authority over the New Hampshire schools which are under the Department of Education. The enforcement of these rules is only enforced on a small percentage of those conducting education for Gas Fitting which is unfair. They cannot enforce these rules on the plumbing courses, only the gas courses. The Board is overreaching and intimidating those in some of the training facilities that their programs will not be accepted if they do not comply. This is contrary to their own rules.

The Board Chairman has made comments in the public meeting minutes to take control of gas license testing and to bring it in house. Who in the Mechanical Licensing department or Board is qualified to write and/or author gas license exam test questions? Who has the expertise to validate the questions and verify the psychometrics of the examinations? The Board has already created conflict with the Plumbers licensing exam process by using a full time employed Massachusetts Plumbing Inspector to offer the New Hampshire plumber licensing exams. License applicants cannot easily get in touch with him to schedule the exams and they are administered by others not the exam provider.

Our recommendation is to completely remove the Saf-Mec 610 rules series and require that the entire Section be rewritten. The 601 rules go beyond the scope of 601.01 in promoting professional standards and are confusing, without rational basis, arbitrary and capricious.

The rules are arbitrary and capricious due to the fact that they are contradictory, unfairly enforced and are to be enforced by individuals with no experience in education. The Board does not have anyone in education on the Board, and to date, they have not been able to adequately review current programs undergoing the review process and have even lost track of one program's submitted materials. The statements that they will be secure at the Boards office is a false statement as the rules state that the materials are under Saf-Mec 104.02 and are placed in the possession of the Custodian of Records.

The original rules have never been ruled upon based on the text. They are not interpreted properly as to the statements in Saf-Mec 301.08 (c); An applicant that wants to have its training program accepted under these rules shall submit to the mechanical licensing board a short statement describing the licensing program or specialty license endorsement program for which the training program is to be evaluated, including:

Granite State Trade School, LLC's courses were approved in 2007 and we have never had a complaint about our courses or programs and the quality of education provided. As stated in the Saf-Mec 308.03 (c) The passage of these rules shall not be deemed to discontinue the approval of any training or examination program approved prior to the effective date of these rules.

GSTS is concerned as a conflict exists whereby some members and inspectors are in allegiance with our competitors. As a result, the protected materials are vulnerable.

The representations regarding the Education Committee by the Board is confusing and vague.

Another security concern is that in the past confidential emails intended for a training facility went to the wrong recipients.

GSTS should be considered grandfathered in. Further, the regulations requiring an audit after 15years are arbitrary and capricious.

Accordingly, Granite State Trade School, LLC is grandfathered in its status as indicated in these rules.

CONCLUSION

The Board's willful unreasonable approach to the audit process with complete disregard for the facts and circumstances raised by GSTS has no satisfactory explanation. The rules regarding GSTS status as grandfathered contradicts the audit process that is now being requested. Further the rules are arbitrary, capricious as applied. The rules as applied are unreasonable and lack clarity consistent with GSTS status as a pre-existing education facility.

Dated: April 27, 2022

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CERTIFICATION

I, Daniel J. Corley, hereby certify that a copy of the foregoing document and has been filed in accordance with ECF rules to the following parties:

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Dated: April 27, 2022

/s/ Daniel J. Corley
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