THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0500

Jason Boucher

v.

Town of Moultonborough

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE TOWN OF MOULTONBOROUGH

By its Attorneys,

Gallagher, Callahan & Gartrell, P.C.

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Oral Argument by Keelan B. Forey

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ISSUES PRESENTED

I. Was the trial court correct when it dismissed Plaintiff's complaint for lack of jurisdiction because Plaintiff had not exhausted his administrative remedies under RSA 41:48?

II. Was the trial court correct in determining Plaintiff could not bring a termination claim directly to the trial court where he alleged he was constructively discharged under the provisions of RSA 41:48?

STATEMENT OF THE FACTS

Jason Boucher ("Plaintiff") appeals the trial court's grant of a motion to dismiss. Accordingly, for the purposes of this appeal only, the facts in the "Complaint" are accepted as true.

Plaintiff was employed by the Town of Moultonborough (the "Town") as a police officer prior to his resignation on or about June 26, 2020. PB 7-8.[1] Plaintiff contends that he received favorable performance reviews until the four months prior to his resignation, i.e., the spring of 2020. PB 7. On or around May 11, 2020, Plaintiff was issued a letter of reprimand regarding his conversations with other police officers about the management of the police department. *Id.* Plaintiff was also the subject of internal investigations. *Id.*

The police manager did not recommend that Plaintiff be terminated for cause, nor was any termination proceedings implemented against Plaintiff. *See generally* PB. Plaintiff never requested a hearing before the Town's Board of Selectmen. *Id.* Instead, Plaintiff brought suit against the Town under alleging a single claim of constructive discharge in violation of RSA 41:48.

[1] "PB" refers to Plaintiff's Brief.

STATEMENT OF THE CASE

In May 2021, Plaintiff brought a single count of constructive discharge pursuant to RSA 41:48 against the Town. PB 7. In February 2022, the Town moved to dismiss the single claim on the following theories: (1) constructive discharge is not an independent cause of action in New Hampshire; (2) Plaintiff's claim under RSA 41:48 was improper because it sought monetary damages; (3) Plaintiff lacked standing; (4) and Plaintiff failed to exhaust his administrative remedies. App. 9-13.[2] Plaintiff objected to the Town's motion. App. 14-17.

In June 2022, the Carroll County Superior Court (*Ignatius*, J.) held a hearing on the Town's motion to dismiss. PB 7. After the hearing, the Carroll County Superior Court (*Ignatius*, J.) granted the Town's motion to dismiss in a narrative order dated August 18, 2022 for failure to exhaust administrative remedies. AB 29-33.[3] The present appeal followed.

[2] "App." refers to Plaintiff's Appendix to Brief.
[3] "AB" refers to Plaintiff's Addendum to Brief.

SUMMARY OF THE ARGUMENT

Plaintiff's lawsuit against the Town alleges a single cause of constructive discharge pursuant to RSA 41:48. The governing statute, RSA 41:48, clearly provides that a police officer may be removed for cause by town selectmen after notice and hearing. A hearing in front of a board of selectmen permits evidentiary testimony and documentary evidence. In turn, a hearing affords due process principles. Accordingly, if due process principles are violated, a decision may be appealed to the trial court. Decisional case law makes clear that if a board's termination decision was unreasonable, unjustified, or unlawful, the decision may be overturned by the trial court.

Plaintiff's decision to resign and waive the privileges afforded to him by statute constitutes a failure to exhaust administrative remedies. Plaintiff cannot bypass the statutory administrative procedures present in RSA 41:48 by (1) resigning; and then (2) seeking review of his resignation under a constructive discharge theory. It is undisputed that the exhaustion rule is based on reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency. Thus, Plaintiff's decision to resign and challenge the circumstances surrounding his resignation circumvents the purposes of the governing statute.

As detailed below, when a statute provides a procedure for an appeal or review of an administrative decision, that procedure is exclusive and must be followed. Plaintiff's many assumptions – inclusive of his argument that a hearing in front of town selectmen would be unfair and therefore

futile – do not insulate him from the statutory rule that a party must exhaust their administrative remedies before appealing to the court. The trial court's dismissal of Plaintiff's claim for constructive discharge pursuant to RSA 41:48 should be affirmed for failure to exhaust administrative remedies.

ARGUMENT

I. STANDARD OF REVIEW

In ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted. *Dembiec v. Town of Holderness*, 167 N.H. 130, 133 (2014). When a motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief. *Krainewood Shores Association, Inc. v. Town of Moultonborough*, 174 N.H. 103, 106 (2021). This includes the defense that a claim should be dismissed for lack of jurisdiction due to the plaintiff's failure to exhaust administrative remedies. *Dembiec*, 167 N.H. at 133.

While the court assumes the plaintiff's allegations to be true and construes all inferences in the light most favorable to the plaintiff, the Court need not assume the truth of statements in the complaint that are merely conclusions of law. *See Tessier v. Rockefeller*, 162 N.H. 324, 330 (2011) (citation and quotation omitted).

II. THE TRIAL COURT WAS CORRECT IN GRANTING THE TOWN'S MOTION TO DISMISS.

The governing statute, RSA 41:48, in relevant part, provides: "Any . . . police officer who is . . . in compliance with the requirements of RSA 106-L:6, shall continue to hold such office during good behavior, unless

sooner removed for cause by the selectmen, after notice and hearing, or unless the town has rescinded its action as provided in RSA 41:47." When examining the language of this statute, the plain and ordinary meaning of the words used is ascribed. *Dembiec*, 167 N.H. at 134. Here, the plain and ordinary meaning is that police officers are entitled to keep their position only during "good behavior" and may be removed "for cause." RSA 41:48.

RSA 41:48 more than adequately secures a police officer's interest in employment. *See Ingersoll v. Williams*, 118 N.H. 135, 137 (1978). The statute, by its plain and ordinary meaning, "restrict[s] the scope of the superior authority's power to terminate an employee." *Id.* In other words, an officer cannot be dismissed "for personal dislike, political disagreement or reasons of that nature. The substance of the reason for dismissal must turn on some substantial cause[.]" *Id.* (internal quotations omitted).

Here, Plaintiff's interpretation of RSA 41:48 is too narrow. The statute does not restrict notice and hearing *only* to employer-initiated terminations, and not employee-initiated terminations. In fact, there is nothing in the statute or decisional case law to suggest that a police officer that contemplates resignation from employment is excluded from its coverage. Moreover, there is nothing in the statute that suggests a police officer that contemplates resigation is not afforded a pretermination hearing before the board of selectmen. The policy reasons behind exhaustion of administrative remedies make clear why such a hearing is necessary.

It is well-settled that, "[o]rdinarily, parties must exhaust their administrative remedies before appealing to the courts." *Dembiec*, 167 N.H. at 133. "This rule is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and

promoting judicial efficiency." *Id.* (internal quotations omitted). There is exception to this general rule "[i]n limited situations" when "the action raises a question that is peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available." *Id*; *Konefal v. Hollis/Brookline Co-op. School Dist.*, 143 N.H. 256, 259 (1998) ("Administrative remedies must be exhausted when the question involves the proper exercise of administrative discretion.")

Plaintiff could have, and should have, requested a pretermination hearing in front of the board of selectmen to exhaust his administrative remedies and render his claim ripe for judicial review. Had Plaintiff requested such a hearing, two things could have happened. First, the board could have denied his request, or second, the board could have granted him a hearing in which Plaintiff would have had (1) the opportunity to participate in a public hearing while represented by counsel; and (2) the opportunity to present and object to evidence about the management of the police department. Regardless, under either outcome – i.e., hearing or no hearing – Plaintiff would have availed himself of the administrative procedure and the action would be ripe for judicial review before the trial court. In other words, there would be a record to guide the trial court in determining whether procedural and due process violations occurred. *See Konefal*, 143 N.H. at 260 ("Since [the plaintiff] circumvented the administrative process, no record exists to guide us in evaluating the constitutional question []he asserts."); *see also Sinkevich v. Nashua*, 97 N.H. 263 (1952).

Plaintiff, in his decision to resign without a request for hearing, made a deliberate choice not to avail himself of the statutory process

afforded by RSA 41:48. Of import, by failing to exhaust his administrative remedies, he waived his right to judicial review of his termination under the single authority conferred to him pursuant to RSA 41:48. By statute, the legislature has established that a hearing in front of the board of selectmen is the primary forum to resolve factual and legal disputes. The plain language of RSA 41:48 does not confer this jurisdiction upon the superior courts. Accordingly, Plaintiff's claim is barred because the legislature has not empowered the trial court to hear Plaintiff's case where he has failed to avail and exhaust his administrative remedies. The trial court did not err in dismissing Plaintiff's claim for lack of jurisdiction.

III. THE TRIAL COURT WAS CORRECT IN DISMISSING PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM.

Despite filing his claim under RSA 41:48, Plaintiff now argues that the provisions of the statute are inapplicable or an exercise in futility because of the nature of his termination or resignation—i.e., he constructively discharged. This argument is unavailing.

First, Plaintiff's argument impermissibly adds new meaning to the statute—i.e., should a police officer choose to resign, he may automatically appeal the terms of his resignation without availing himself of the administrative requirements of RSA 41:48 to the trial court. As discussed in Section II, the legislature did not see fit to include this in the statute.

Second, Plaintiff's comparison to *Porter v. City of Manchester* is distinguishable. There, only after significant involvement by human resources and the Manchester Police Department, did the plaintiff file an

appeal with the City of Manchester Board of Personnel Appeals, but then ultimately withdrew the appeal. *Porter v. City of Manchester*, 151 N.H. 30, 36 (2004). Thus, the plaintiff's circumstance fell within an exception to the general rule regarding exhaustion because further administrative action would be useless where the City of Manchester had already conceded that it lacked authority to keep the plaintiff's supervisor from retaliating against the plaintiff. *Id.* at 40-41. Here, unlike in *Porter*, Plaintiff made no attempts to exhaust administrative remedies and therefore had no basis to know whether further administrative action would be futile. *See e.g.*, *Dembiec*, 167 N.H. at 133-34 (explaining exhaustion is not required "when *further administrative action* would be useless.") (emphasis added). Thus, in *Porter*, there was an attempt to exhaust administrative remedies whereas here, there is no dispute that Plaintiff made no attempt to exhaust administrative remedies—a distinction that is fatal to Plaintiff's comparison.

Plaintiff's reliance on the case out of Washington is equally misplaced. In *Allstot v. Edwards* there are several factual differences from the instant case that are worth noting. First, prior to any constructive discharge, the plaintiff in *Allstot* was fired and exhausted his administrative remedies at the administrative and trial court levels, where the trial court ultimately reinstated the plaintiff. *Allstot v. Edwards*, 116 Wash.App. 424, 426 (Wash. Ct. App. 2003). Only after the plaintiff exhausted his administrative remedies regarding his termination and after reinstatement as ordered by the trial court, did the plaintiff eventually resign. *Id.* at 429. In light of this specific factual circumstance the Washington Court permitted the claim to proceed forward under a constructive discharge theory. *Id.* at

430, 433. Here, unlike in *Allstot*, Plaintiff had not previously availed himself of his administrative remedies and been reinstated to his current position—rather, Plaintiff just resigned.

Thus, both *Porter* and *Allstot* do not support Plaintiff's argument that constructive discharge alone does not require a plaintiff to exhaust his administrative remedies. Instead, these cases support the proposition that an attempt at exhaustion of administrative remedies is necessary. Again, this distinction is critical because in the instant case Plaintiff made no attempt to exhaust his administrative remedies.

Plaintiff's argument that because he constructively discharged the administrative process was an exercise in futility does not obviate the need to exhaust administrative remedies. Several states have decision case law on point with the issue. *See e.g.*, *Pierce v. Whitenack*, 440 S.W.3d 392, 399-400 (Ky. Ct. App. 2014) (holding that the plaintiff/police officer's claims were precluded by his failure to exhaust administrative remedies under the statute even where he argued he was constructively discharged); *Burton v. District of Columbia*, 835 A.2d 1076, 1077-78 (D.C. App. 2003) (holding that even under a wrongful constructive discharge theory of liability, the plaintiff/police officer failed to exhaust his administrative remedies as required, and therefore the trial court's dismissal for lack of jurisdiction was affirmed); *Mollett v. City of Taylor*, 197 Mich.App. 328, 337-38 (Mich. Ct. App. 1992) ("Given that there is no legal difference between expressly discharged employees and constructively discharged employees, we hold that plaintiff must exhaust his administrative remedies before commencing an action in circuit court.")

Plaintiff's argument is further undercut by the fact that New Hampshire does not treat constructive discharge as an independent claim. *See e.g.*, *Clark v. New Hampshire Department of Employment Security*, 171 N.H. 639, 646 (2019) (recognizing constructive discharge as an exception to the termination component of a wrongful discharge claim); *see also Slater v. Town of Exeter*, No. 07-cv-407-JL, 2009 WL 737112, at *6 (D.N.H. Mar. 20, 2009) ("The theory is a narrow one: apprehension of future termination is insufficient to establish constructive discharge—instead, an employee is obliged not to assume the worst, and not to jump to conclusions too fast.") (internal quotations omitted). Furthermore, even assuming for sake of argument that Plaintiff had exhausted his administrative remedies and his claim was properly before the trial court, the Town avers that Plaintiff's complaint fails to state a wrongful termination claim.

To prevail upon a wrongful termination claim, Plaintiff must establish that: (1) the Town terminated the employment out of bad faith, malice, or retaliation; and (2) the Town terminated the employment because Plaintiff performed acts that public policy would encourage or because he refused to perform acts that public policy would condemn. *See Cloutier v. A. & P. Tea Co., Inc.*, 121 N.H. 915, 921-22 (1981). Courts have held that constructive discharge may satisfy the first prong of the analysis, but here, Plaintiff has not alleged facts sufficient to establish that the police department's management rendered his working conditions "so difficult and intolerable that a reasonable person would feel forced to resign." *Karch v. BayBank FSB*, 147 N.H. 525, 536 (2002). Constructive discharge is a high threshold and "is not established by showing relatively minor abuse of

an employee. Rather, the adverse working conditions must generally be ongoing, repetitive, pervasive, and severe." *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 249 (2006) (citation, emphasis, and internal punctuation omitted); *see also Netska v. Hubbell, Inc.*, No. 22-cv-265-SM, 2023 WL 199340, at *2 (D.N.H. Jan. 17, 2023) ("The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins - thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world. Thus, the constructive discharge standard, properly applied, does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics.") (quoting *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000)). Moreover, Plaintiff did not allege any facts sufficient to satisfy the second part of the claim, i.e., that Plaintiff was constructively discharged for performing acts that public policy would encourage or because he refused to perform acts that public policy would condemn.

In sum, the due process afforded to a police officer in RSA 41:48, and the exhaustion of administrative remedies serves several important purposes that are applicable regardless of the nature of termination: (1) judicial review is best made upon a full factual record; (2) resolution of the issues may require the agency's experience and/or may have been entrusted by the legislature to the agency's discretion; and (3) agency review may render a judicial resolution unnecessary. Exhaustion of administrative remedies is a well-settled rule of judicial administration that has long been applied in this state. The Town is not arguing that Plaintiff, as a police officer, is precluded from judicial review—but, by waiving or not availing himself of the administrative remedies under RSA 41:48, Plaintiff failed to

create the administrative record that generates his right to judicial review. Plaintiff's argument that constructive discharge rendered the administrative remedies under RSA 41:48 inapplicable is not an exception to this principle, and the trial court did not err in dismissing Plaintiff's claim.

CONCLUSION

For the foregoing reasons, the Town of Moultonborough respectfully requests that this Honorable Court affirm the judgment below.

POSITION ON ORAL ARGUMENT

In the event the Court determines that oral argument would assist in deciding this appeal, the Town requests 15 minutes for oral argument and designates Keelan B. Forey to present it.

Respectfully Submitted,

TOWN OF MOULTONBOROUGH

By its Attorneys,

April 10, 2023

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CERTIFICATE OF COMPLIANCE

I, Keelan B. Forey, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 3,922 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 10, 2023 *<u>/s/ Keelan B. Forey</u>*
Keelan B. Forey

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Town of Moultonborough's brief shall be served on Jason Major, counsel for Plaintiff, through the New Hampshire Supreme Court's electronic filing system.

April 10, 2023 */s/ Keelan B. Forey*
Keelan B. Forey