THE STATE OF NEW HAMPSHIRE
SUPREME COURT

JASON BOUCHER

V.

TOWN OF MOULTONBOROUGH

CASE NO. 2022-0500

MANDATORY APPEAL PURSUANT TO RULE 7
CARROLL COUNTY SUPERIOR COURT

DOCKET NO. 212-2021-CV-00061

BRIEF OF APPELLANT/PLAINTIFF

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QUESTIONS PRESENTED

1. Whether the Trial Court erred by granting the Defendant's Motion to Dismiss the Plaintiff's Complaint? *Addendum at 29; Appendix at 14, 17, 49*

2. Whether the Trial Court erred by ruling that it did not have jurisdiction to hear the Plaintiff's case because the Plaintiff failed to exhaust administrative remedies under RSA 41:48, where the only administrative remedy set forth in the statute was not applicable to a constructive discharge claim? *Id*.

3. Whether the Trial Court erred by ruling that the Plaintiff could not bring a constructive discharge claim, as a matter of law, despite the Plaintiff having a statutory right as a full time police officer to retain his position "during good behavior" as set forth in RSA 41:48? *Id.*

4. Whether the Trial Court erred by dismissing the Plaintiff's Complaint when, if the facts alleged were proven true, a reasonable jury could have found that the Plaintiff was compelled to resign because of the Defendant's creation of an intolerable hostile work environment, constituting a constructive discharge in violation of the Plaintiff's statutory right to maintain his employment during good behavior pursuant to RSA 41:48? *Id*.

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS CITED

41:48 Tenure of Office. – Any permanent constable or police officer who is either elected under the provisions of RSA 41:47 or appointed for full-time duty under the provisions of RSA 105:1, and who is in compliance with the requirements of RSA 188-F:27, 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good behavior, unless sooner removed for cause by the selectmen, after notice and hearing, or unless the town has rescinded its action as provided in RSA 41:47. Any such elected permanent constable or police officer shall be deemed to be a permanent policeman, and entitled to benefits under the provisions of RSA 103 if otherwise qualified.

N.H. Constitution, Part 1, Article 14 [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

STATEMENT OF THE CASE

The Plaintiff-Appellant filed the underlying lawsuit on or about May 13, 2021. His suit alleges that he was subjected to a pattern of undermining and harassment by his employer that was intended to, and did, constructively discharge him in violation of the "for cause" termination standard set forth in RSA 41:48, which protects his right to remain employed during "good behavior." Appellant's Appendix at 2-8.

The Defendant filed a Motion to Dismiss on or about February 15, 2022,[1] to which the Plaintiff objected. Oral argument on the Defendant's Motion was held on June 22, 2022. Id. at 9, 17, 45.

The Superior Court granted the Defendant's Motion to Dismiss without prejudice, holding that the Plaintiff had failed to exhaust his administrative remedies by not seeking a hearing before the Moultonborough Board of Selectmen as to the appropriateness of his termination "even if only constructively," and that the Court did not have subject matter jurisdiction over his claim. Addendum to Brief at 29. This appeal followed.

STATEMENT OF FACTS

The Plaintiff-Appellant, Jason Boucher ("Boucher"), served as a police officer for the Town of Moultonborough for a total of 19 years, with more than 17 of those year in a full-time capacity. He most recently held the rank of Sergeant. He provided exemplary performance to the Town, having had no formal disciplinary actions taken against him until the final four months of his tenure with the Moultonborough Police Department, in the Spring of 2020 which, combined with a pattern of undermining and

[1] The Defendant was originally represented by Attorney Samantha Elliot, prior to her appointment as a U.S. District Court judge. As a result of her appointment, proceedings in the case were delayed while new defense counsel familiarized themselves with the case.

harassment, caused Sgt. Boucher to feel reasonably compelled to resign on June 26, 2020. Appellant's Appendix (hereinafter "App.") at 1, ¶ 5.

During the course of his career in Moultonborough, Sgt. Boucher found himself at odds with the Board of Selectmen. The adverse relationship began when Sgt. Boucher became involved in efforts to unionize the rank-and-file officers, and was not improved when Sgt. Boucher supported a Chief candidate that the Board did not. App. at 2, ¶ 6. As set forth below, the Board's operatives within the Police Department took advantage of this adverse relationship to move against Sgt. Boucher. App. at 3-4, 7, ¶¶ 10, 15, 25.

Moultonborough Police Chief John Monaghan retired early in 2020, after only two years of service in Moultonborough, under pressure from a hostile Board of Selectmen. He was replaced by Interim Police Manager David Crawford ("Crawford"), who was under the direct control of the Board of Selectmen. App. at 2, ¶8. By the early Spring of 2020, Boucher found himself under persistent attack by Crawford and his loyal subordinate, an ambitious lower-ranking officer named Peter John, with the full support of the Board of Selectmen. App. at 3, 7, ¶¶ 10, 25. Crawford enlisted John to cut Sgt. Boucher and the other Sergeants out of the daily operations of the Police Department, turning the chain-of-command upside down. App. at 2, ¶ 8. It was not long before Boucher found himself the subject of serial internal investigations orchestrated by John and Crawford, for simply attempting to conduct the ordinary business of a police Sergeant. Id.

On or about March 16, 2020, Sgt. Boucher, in his capacity as Officer Peter John's direct supervisor, was required to counsel John related to his inability or unwillingness to pull his weight on investigations and patrol calls. App. at 3, ¶9. As part of that supervision, Boucher had informed John that, if he could not keep up with his patrol and investigation workload, the prosecutions and investigations that John was supposed to manage would

have to be reassigned to the Department's Sergeants. Peter John was visibly unhappy with Boucher after this discussion. App. at 3, ¶ 9.

Not long after his counseling of Officer John, Boucher called Interim Manager Crawford about unexpected and disruptive changes that Crawford had made to overtime rules, some of which were in violation of the officers' collective bargaining agreement. Boucher was abruptly dressed down for simply trying to have a polite conversation about the issue. App. at 3, ¶ 10. Boucher was told words to the effect of, "If you can't work for me, I can fix that," and "everything I do is by order of the Board of Selectmen!" Crawford only communicated with Boucher via e-mail or through Peter John after that call. Id.

After Crawford's abrupt and angry outburst during the phone call with Boucher, Crawford essentially used Officer John to run the Police Department, with most administrative matters being passed through John to the other officers, bypassing Sgt. Boucher and the other Sergeants and the chain of command policy entirely. App. at 3, ¶ 11. Crawford reportedly had experience as a police officer and "police consultant." As such, he certainly understood the importance of the chain of command, and the negative impact on morale and the undermining of leadership that occurs when it is bypassed. Id. He also undoubtedly understood the importance of impartial and unbiased investigations of potential disciplinary matters. His conduct toward Boucher thereafter was very clearly aimed at undermining and isolating him. Id.

On May 11, 2020, Boucher was issued a letter of reprimand based on his having conversations with other officers about the negative impact on morale that Crawford's management was having. The complaining witness was Officer Peter John. The investigating officer was also Officer John. All evidence to support the "investigation" was provided by Officer John. App. at 4, ¶ 12.

Initiating accusatory internal investigations related to such trivial, ordinary business matters was troubling enough to Boucher. However, it was far more troubling to Boucher that Crawford had placed these "investigations" into the hands of Peter John, who was (1) a subordinate officer, (2) a fact witness with regard to at least some of the circumstances that were being investigated; and (3) openly unfriendly and biased against Boucher owing to Boucher's earlier and obviously unappreciated supervision of John. App. at 4, ¶ 13.

Officer John began asking other officers to write statements against Boucher. All refused. When that failed, Crawford ordered Boucher to write a letter of complaint *against himself*, under threat of discipline, that was then investigated by none other than Officer Peter John. App. at 4, ¶ 14.

On top of making the working conditions horrible with unfounded and petty disciplinary actions, John began acting strangely around the Plaintiff, at one point telling him "I know you want to stab me, but I only answer questions asked of me." Sgt. Boucher had no idea what that disturbing comment meant, so he said only "Uhh, I'm good," and continued washing his cruiser as John stood nearby, watching Boucher in an awkward and creepy silence. App. at 5, ¶ 16.

With his police consultant background, Crawford also undoubtedly knew that, as a full-time police officer, Boucher was entitled to the "for cause" termination protections of RSA 41:48. App. at 5, ¶ 17. As such, he knew that he would have to create a disciplinary record before he could justify asking the Board for Sgt. Boucher's termination. With that obvious understanding, Crawford and John initiated serial internal investigations – to either find "something" to justify disciplinary action, or to drive Boucher out via constructive discharge. Id.

Boucher had, in fact, witnessed Crawford and John re-investigate another good officer, who had already received discipline following a first

investigation, and then use that second investigation to justify terminating him. This demonstrated to Boucher that Crawford and John had little respect for the rules if they got in the way of eliminating the personnel they sought to get rid of. Id. Three more petty and baseless internal investigations were thereafter initiated against Boucher within a period of a few weeks – always initiated, investigated, and supported solely by Officer John. App. at 5, ¶¶ 18-19. This was done with the political support of the Board of Selectmen. App. at 7, ¶ 25.

In Police work, a formal internal investigation generally signals an intention by the employer to seek the highest and, therefore, potentially most career-impacting levels of discipline. App. at 6, ¶ 20. An officer under internal investigation is not allowed to discuss it with anyone, under threat of additional discipline. Four such investigations in the span of six weeks, on an officer with as clean a record as Boucher's, is a sign of an obvious retaliatory witch-hunt. Id. It is exactly the sort of employer conduct that puts an officer in Boucher's position in fear of losing their job in a way that impairs their reputation in the police community, potentially impacting their standing with the Police Standards and Training Council, their ability to obtain other work in policing, and therefore their ability to provide for their family. Id.

The antics of Crawford and John began to have a serious impact Sgt. Boucher's mental and physical health. He needed to be seen by health professionals due to the physical symptoms he experienced from the stress that Crawford and John, with the support of the Select Board, placed on him in their efforts to oust him from his 19-year career job. App. at 6-7, ¶¶ 21, 25. Boucher found himself in the position of having to decide whether to place himself at risk of further health damage for a Police Department and Town being managed by people who he clearly could not trust, and who clearly wanted to push him out for personal or political reasons. Id.

With the conditions becoming intolerable for a police officer in his position, Boucher was reasonably compelled to resign under duress on June 26, 2020. App. at 6; ¶ 22. He suffered a significant loss of pay and benefits. He has also suffered and continues to suffer severe emotional and physical distress, which required treatment by medical professionals, owing to the treatment he received by the Town of Moultonborough in its effort to force him from his job. Id.

SUMMARY OF THE ARGUMENT

The trial court erred in its ruling that, pursuant to RSA 41:48, the Plaintiff-Appellant was required to exhaust administrative remedies by seeking a hearing on the propriety of his constructive discharge from employment. Such an appeal would be an exercise in futility because, assuming the Plaintiff was successful, his "remedy" would be a Hobson's choice of returning work in the same environment that led to his constructive discharge, or simply quitting and walking away from a job he did not deserve to lose.

Nothing in the language of RSA 41:48 requires or empowers the Board of Selectmen, or any other body, to correct the hostile work environment that led to the Plaintiff being constructively discharged. Merely ruling that there was no cause to terminate the Plaintiff's employment, which is the only relief a due process hearing under RSA 41:48 provides for, does not provide a meaningful remedy. It does not cause a reversal of the Plaintiff's constructive discharge. Reading RSA 41:48 to require a hearing in constructive discharge cases therefore leads to an absurd result, which the Legislature could not have intended, given that the statute's "for cause" termination standard was intended to provide enhanced employment security for full-time police officers. A futile hearing for constructively discharged officers does not support the public policy underlying the statute.

A cause of action for damages is the appropriate remedy for a police officer who is unlawfully constructively discharged in violation of his right to keep his job during good behavior. Without such a remedy, the "for cause" termination standard set forth in RSA 41:48 is all too easily circumvented. An employer who desires the termination of a good officer, but has no formal cause to support such a dismissal, would only need to create an intolerable working environment to obtain a result that it otherwise legally could not. A meaningful remedy is necessary to discourage towns from sidestepping an officer's right to keep his job in the face of bad faith, unlawful efforts to force him out, which a due process hearing simply does not provide.

STANDARD OF REVIEW

In reviewing a trial court's grant of a motion to dismiss, the Supreme Court's standard of review is "whether the allegations in the Plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Plaisted v. LaBrie, 165 N.H. 194, 195 (2013). The Court will "assume that the Plaintiff's pleadings are true and construe all reasonable inferences in the light most favorable to [him]. Id. "When, as here, the parties' arguments require us to engage in statutory interpretation," the Court's "review is *de novo*." New England Backflow v. Gagne, 172 N.H. 655, 661 (2019).

ARGUMENT

A. The Appellant Was Not Required to Exhaust Any Administrative Remedies Because The Hearing Provided by RSA 41:48 Would Be an Exercise in Futility in the Context of *any* Constructive Discharge, and Especially One Where the Board Charged with Holding the Hearing Contributed to the Constructive Discharge Environment

The trial court erred by ruling that the Plaintiff's remedy for a constructive discharge was to seek a hearing before the same Board of Selectmen that supported the effort to undermine him and create an untenable

working environment with the goal of pushing him out. Not only does the express language of RSA 41:48 not contemplate the appeal of a constructive discharge, but such a hearing would be an exercise in futility, because the "remedy" would be returning the Plaintiff to employment in the same position and environment which led to his constructive discharge in the first place. That is an absurd result that the Legislature surely did not intend. A "remedy" that simply guarantees the Plaintiff can continue to work for an employer that is constructively discharging him from his employment is not an effective remedy and does not uphold the public policy underlying RSA 41:48's for-cause termination protection.

1. The Express Language of RSA 41:48 Does Not Contemplate a Hearing in Cases Where the Officer Is Constructively Discharged, Nor Does it Provide an Adequate Remedy for Such Cases

RSA 41:48 provides:

> **41:48 Tenure of Office. –** Any permanent constable or police officer who is either elected under the provisions of RSA 41:47 or appointed for full-time duty under the provisions of RSA 105:1, and who is in compliance with the requirements of RSA 188-F:27, 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. Any such elected permanent constable or police officer shall be deemed to be a permanent policeman, and entitled to benefits under the provisions of RSA 103 if otherwise qualified.

(emphasis added). The plain language of the statute makes it clear that the Legislature did not contemplate the hearing right provided by RSA 41:48 as an appropriate remedy for constructive discharge situations. Such an interpretation leads to an impermissibly absurd result.

Statutory interpretation is a question of law, which this Court reviews *de novo*. See Appeal of Local Gov't Center, 165 N.H. 790, 804 (2014). This Court is "the final arbiter of the intent of the Legislature as expressed in the

words of the statue considered as a whole." Id. The Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Id. The purpose is to "discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. Id. It is "not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute." State v. Breest, 167 N.H. 210, 214 (2014)(quoting State v. Costella, 166 N.H. 705, 711 (2014)).

The operative language of RSA 41:48 states that a full-time police officer "shall continue to hold such office during good behavior, unless sooner removed for cause by the selectmen, after notice and hearing." Breaking this language down, there are three key takeaways. First, the officer has a right to "continue to hold such office during good behavior." This clause stands for the proposition that a full-time police officer has a right to keep his job so long as he is acting in "good behavior" which, presumably, means he has not engaged in some sort of misconduct that would justify his removal. This legal conclusion is supported by the next clause, which provides that the officer may only be "removed for cause by the selectmen." Simply put, if the officer has not engaged in misconduct that would give "cause" to justify his removal, he has a right to maintain his employment. Finally, he has a right to receive "notice" of the cause relied upon to justify any such effort to remove him, and a "hearing," presumably to determine if the alleged cause has sufficient merit to justify terminating the officer's employment.

Read as a whole, RSA 41:48 is reasonably interpreted as providing that a full-time police officer has a right to remain employed, as long as he does not engage in misconduct that would justify his removal. If he does, in the eyes of his employer, engage in such misconduct, he is entitled to notice of the charges against him and a due process hearing at which he can attempt

to demonstrate that the proffered justifications for his termination are without merit. By its own terms, RSA 41:48 does not contemplate the situation currently before the Court, where Plaintiff Boucher never received any formal notice of an intent to dismiss him, or charges that would justify such a removal, and he was never formally removed from his employment by the Board of Selectmen. The statute does not contemplate a situation where a full-time officer, during good behavior, with a statutory right to remain employed, is bullied and undermined to the point that he is compelled to resign. As noted in the proceedings below, if Plaintiff Boucher had asked for a hearing, it is easy to imagine that the Board of Selectmen would have answered with a response like: "A hearing on what? We haven't removed you or provided the notice of charges that would create your right to such a hearing." App. at 51-52; see also Allstot v. Edwards, 65 P.3d 696, 700-701 (Wash. Court of Appeals 2003).

More importantly, RSA 41:48 provides an obvious and effective remedy *only* for an officer who has been unjustly, but formally removed from his position. If the officer goes to a hearing and is successful in demonstrating that the charges against him are erroneous or do not warrant termination, he is entitled to return to his job. On the other hand, there is no such remedy set forth in the statute for an employee who is constructively discharged. A constructive discharge occurs when "an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign." Porter v. City of Manchester, 151 N.H. 30, 42 (2004).

Nothing in the language of RSA 41:48 provides a genuine remedy for an employee afflicted with such an abusive employer-employee relationship. There is nothing in the statute which either requires or empowers the Board holding the hearing (or the Superior Court, if the Board's decision is appealed) to "fix" the work environment which led to the constructive

discharge. The only remedy contemplated by the language of RSA 41:48 is the reversal of a formal decision to remove an employee which, as described in more detail below, is no remedy at all for an employee who has been constructively discharged. The best an employee appealing a constructive discharge can hope for, if RSA 41:48 was applied that way, is the right to return to the hostile work environment which caused them to be constructively discharged, so that they can likely go through it all again, with the same result – i.e., another or, more accurately stated, *continuing* constructive discharge. That is plainly an absurd result, in opposition to the Legislature's clear intent to protect a police officer's right to remain employed during good behavior.

2. Attempting to "Exhaust" the Non-Effective "Remedy" of a Hearing Before an Antagonistic Board of Selectmen Would Plainly Be Futile

The futility of the process ordered by the trial court especially apparent in cases like Plaintiff Boucher's, where it is alleged that the same Board of Selectmen he would have to appeal to supported his constructive discharge. App. at 3, 4, 7, ¶¶ 6, 10, 25; App. at 52; Porter, 151 N.H. at 40-41. Even if, as the trial court suggested, a neutral board was substituted for the due process hearing, the Plaintiff would ultimately return to work under the same Board that assisted in creating the abusive environment which led to his constructive discharge. Neither the neutral stand-in board, nor the Superior Court, is empowered to change that fact. A hearing to determine that the Plaintiff can return to work under the same employer that constructively discharged him would clearly be a pointless and futile exercise. The hearing option set forth in RSA 41:48 therefore does not present an effective remedy for a constructively discharged police officer.

3. Exhaustion of Administrative Remedies is Not Required Where Attempting to Do So Would Be Futile

Understanding what RSA 41:48 does and, more importantly does *not*, provide for, quickly leads to the conclusion that requiring the Plaintiff to "exhaust his administrative remedies" as ordered by the trial court, would be an unwarranted exercise in futility. It is black letter law that the exhaustion of such remedies is not required when doing so would be so futile.

This Court has recognized that exhaustion of administrative remedies "is not required 'when further administrative action would be useless.'" Dembiec v. Town of Holderness, 167 NH 130, 133-34 (2014) (quoting Porter, 151 N.H. at 40). "Even where exhaustion is seemingly mandated by statute ..., the requirement is not absolute." Washington v. Barr, 925 F.3d 109, 118 (2d Cir. 2019). Exceptions to the doctrine of exhaustion of administrative remedies include "where exhaustion would be futile …, where the administrative process would be incapable of granting adequate relief, and … where the pursuing agency review would subject Plaintiffs to undue prejudice." U.S. v. Belle, 457 F.Supp.2d 134, 138 (D. Conn 2020) (citing Washington, 925 F.3d at 118-20, internal quotations omitted)). See also Bartlett v. U.S. Dept. of Agriculture, 716 F.3d 464, 474 (8th Cir. 2013) (holding that exhaustion was not required where the agency did not have authority to grant effective relief on the underlying issue. "An administrative remedy will be deemed futile if there is doubt about whether the agency could grant effective relief." (internal citations omitted)).

All three exceptions would apply to the facts of this case. As set forth above, requiring a constructively discharged police officer to have a hearing to determine if he could return to the hostile environment that constructively discharged him would be a useless exercise. Moreover, the Board holding the hearing, even if neutral, would not have the *power* to do anything more than return the officer to the same employment situation he was constructively discharged from, so that he could simply be constructively discharged again at the whim of his employer. In this case, the Board that

Appellant Boucher would appeal to is the same Board that supported pushing him out, which plainly constitutes undue prejudice to him. App. at 3, 4, 7, ¶¶ 6, 10, 25; App. at 52. An RSA 41:48 hearing was clearly not intended for the situation that the Appellant is in and would be a frustratingly ineffective waste of time.

The New Hampshire Supreme Court reviewed similar facts in the Porter v. City of Manchester case almost twenty years ago and came to the conclusion that should control in the instant case – that exhaustion of administrative remedies was not required in a constructive discharge case. In Porter, the Plaintiff claimed that he was constructively discharged from his position with the City of Manchester. See Porter, 151 N.H. at 35-36. The City argued, as does the Defendant in this case, that the Plaintiff had failed to exhaust administrative remedies available to him. Id. at 40. The Court ruled as follows:

> This case falls within an exception to the general rule that administrative remedies must be exhausted prior to appealing to the courts. Even if Porter had followed through with his appeal and the board had rescinded his suspension, he would still have been required to work under Lafond's supervision. At trial, the city conceded that it lacked the authority to keep Lafond from retaliating against Porter. Moreover, at oral argument, we inquired as to whether the board had the authority to award back pay. The city said it "assumed" that the board had the authority to do so but could not categorically answer our question. Because the city has not demonstrated that further administrative action would have been useful, we affirm the trial court's ruling that exhaustion was not required.

Id. at 41 (emphasis added).

The facts of the instant case are directly analogous. Even if Plaintiff-Appellant Boucher was successful before a hostile Moultonborough Board of Selectmen or its neutral stand-in, and even if he succeeded on a subsequent appeal to Superior Court in the event a Board decision went against him, he would, like the Plaintiff in Porter, have to return to work under the

supervision of the same hostile Board and its hostile underlings within the Police Department. Neither a neutral stand-in Board, nor the Superior Court, have the authority to prevent further retaliation and efforts to constructively discharge Boucher. The hearing right intended for police officers who are formally charged with misconduct and removed on that basis therefore presents no meaningful relief for a Plaintiff in the Appellant's position and constitutes nothing more than a futile waste of time and effort.

Examining a statutory scheme that was similar, but more detailed than RSA 41:48, the Washington Court of Appeals reached the same conclusion in the case of Allstot v. Edwards, 65 P.3d 696 (Wash. Court of Appeals 2003). As with the instant case, the employer argued that the police officer employee had failed to exhaust administrative remedies after he brought a constructive discharge case. The court in Allstot reasoned as follows:

> The Town argues simply that Washington law does not distinguish between express and constructive wrongful discharge. This argument suggests that whether the discharge is express or constructive makes no difference; either way, an employee is entitled to *some* remedy for a wrongful discharge. In light of the Town's concession that Mr. Allstot has a claim cognizable in *some* forum, the issue here is whether his claim must be raised initially through the civil service procedure provided by RCW 41.12.090.
>
> As Mr. Allstot points out, a claim for wrongful constructive discharge would be difficult or impossible to address under RCW 41.12.090, which requires a written statement of the accusation against the affected employee and also requires the employee to make a written demand for an investigation within 10 days of his or her removal, suspension, demotion, or discharge. By its nature, a constructive discharge may not be the result of a single, identifiable event. In this circumstance (as in this case), a written statement of accusations may not be present. And, because there is no actual dismissal, it also would be impossible to determine when the 10–day period began. These difficulties suggest the legislature did not intend for the statute to apply to wrongful *constructive* discharges.

> Therefore, because the civil service commission has no clearly established mechanisms for resolving claims for wrongful constructive discharges, Mr. Allstot was not required to exhaust the administrative remedy.

Id. at 701.

This Court should rule, as it did in Porter, and as the Washington Court of Appeals did in Allstot, that the Plaintiff-Appellant was not required to exhaust administrative remedies by having a pointless hearing before the Board of Selectmen. Such a hearing would, at best, provide the Plaintiff with the Hobson's choice of either returning to the abusive work environment that constructively terminated his employment, or simply walking away without any meaningful remedy after having been illegally discharged.

B. The Plaintiff Has Stated a Claim For Which Relief May Be Granted, Because the Defendant Illegally Circumvented the "For Cause" Termination Standard Set Forth in RSA 41:48, By Constructively Discharging the Plaintiff From His Employment and Leaving Him Without Any Meaningful Remedy.

The Plaintiff-Appellant's claim for relief is premised on a simple concept. The defendant violated the Plaintiff's statutory right to remain employed in his position absent good cause to remove him, as guaranteed to him by RSA 41:48, by constructively discharging him. By constructively discharging the Plaintiff, because they could not remove him for cause, the Defendant effectively terminated the Plaintiff by illegal means. Without a damages remedy, the Plaintiff has no effective recourse to address his illegal discharge.

As set forth above, the language of RSA 41:48 makes it plain that the Plaintiff had a statutory right to continue in his employment as full-time police officer unless removed for cause. Like many other statutory rights enacted to protect employees,[2] the protections set forth in RSA 41:48

[2] I.e., RSA 275, RSA 275-E, RSA 98-E, RSA 354-A, and a host of other state and federal employment statutes.

effectively became a term and condition of the Plaintiff's employment – his employment contract - with the Town. See e.g., Gilman v. Cheshire County, 126 N.H. 445, 449-50 (1985). The usual "at-will" rule for employer-employee relationships is modified by RSA 41:48, providing full-time police officers like the Plaintiff with greater job security, by guaranteeing that they may not legally be terminated from their employment due to political, personal, or other petty reasons.

The undoubted reason the legislature provided such a protective benefit for police officers is to make employment as a full-time police officer – a job that is fraught with potential dangers, that requires contact with unruly criminal elements, along with unfavorable working hours and generally low pay – more attractive via the provision of a guarantee against arbitrary and capricious terminations. Such benefits are:

> … a means by which the [governmental employer] can attract qualified persons to enter and remain in [governmental] employment, and an employee accepts an offer of employment or continues in employment ... in reliance on the [governmental employer's] representations that it will provide such benefits. Because such benefits constitute a part of an employee's compensation, they form a part of the employment contract, and the right to receive such benefits vests at the time one becomes a governmental employee or continues in such employment.

Id. (internal quotations omitted, citing Jeannette v. N.H. Personnel Comm'n, 118 N.H. 597, 601 (1978)). RSA 41:48 establishes a clear public policy protecting the right of police officers to maintain their full-time employment, protecting and serving communities across the state, absent good cause for their termination.

In the instant case, Plaintiff-Appellant alleges that the Defendant, Town of Moultonborough, desiring to end his employment for petty personal or political reasons, but not having the requisite "cause" necessary to legally terminate him, forced the Plaintiff's termination by constructive discharge.

App. at 5-7, ¶¶ 10-22, 25-27. By doing so, the Defendant left him without any genuinely *effective* remedy and illegally circumvented the "for cause" termination standard that the Legislature created to protect his right to continued employment during good behavior. A cause of action for money damages is the natural and appropriate remedy for this situation. See N.H. Const., Pt 1, Art. 14. Allowing constructively discharged full-time police officers to recover damages would put them on at least equal footing with at-will employees who are constructively discharged in violation of their statutory or common law rights.

C. A Money Damages Remedy For a Police Officer Constructively Discharged in Contravention of His or Her Right to Continued Employment During Good Behavior Is Essential to Vindicating the Public Policy Set Forth in RSA 41:48.

As noted in section B, *supra*, the obvious legislative intent underlying RSA 41:48 is to provide full-time police officers with a greater degree of job security than an at-will employee, in recognition of their potentially dangerous and often underappreciated public service. Effectively providing them with *less* protection than at-will employees who are illegally constructively discharged would be an affront to that public policy. Yet, that is what the Defendant's argument and the trial court's ruling would do.

Not providing a remedy in damages for police officers in the Appellant's position would invite their employers to believe they can abuse and mistreat officers who are acting in good behavior, and should therefore enjoy a statutory right to keep their jobs pursuant to RSA 41:48, so as to force the employee into a termination that would otherwise be unlawful. Without a damages remedy, full-time police officers like the Appellant would have no effective legal recourse when tyrannical select boards, chiefs, or other appointing authorities decided to push such employees out in bad faith by creating intolerable working conditions as an end-run around the officers' right

to maintain their employment absent good cause to terminate. Only allowing a futile hearing process would effectively make the "for cause" termination standard in RSA 41:48, intended by the Legislature to protect full-time policy officers from arbitrary firings, illusory and unenforceable.

On the other hand, recognizing that full-time officers who are constructively discharged in violation of their rights under RSA 41:48 have a damages remedy would put those officers on at least equal footing with at-will employees who are constructively discharged in violation of their rights. While at-will employees can usually be fired for any reason or no reason, see, e.g., Cloutier v. Great Atlantic & Pac. Tea Co. Inc., 121 N.H. 915, 919 (1981), they are provided limited common law and statutory protections that make it unlawful to interfere with their employment, whether by direct or constructive termination, in certain circumstances. See, e.g., Porter, 151 N.H. at 38-42; RSA 354-A; RSA 275-E, etc. Those at-will employees have damages remedies when they are unlawfully constructively terminated, and it is those damages remedies that provide teeth to the employment protection schemes devised by the Legislature and/or this Court. Without equivalent "teeth" to vindicate the rights of police officers who are constructively discharged, the "for cause" protective intent underlying RSA 41:48 becomes all-too-easily circumvented and without legal effect.

1. Recognizing a Money Damages Remedy for An Employer's Attempt to Circumvent the "For Cause" Termination Standard in RSA 41:48 Does Not Create an Independent, Free-Standing Tort Claim for Constructive Discharge

The Defendant argued, erroneously, before the trial court that the Plaintiff was attempting state a novel independent "Constructive Discharge" claim. This argument is a red herring, and as set forth above, does not accurately state what Appellant is claiming as a basis for a right to recover.

The Appellant understands fully (and has never argued to the contrary, see App. at 25-30, 50-51) that he does not have a free-standing "right" not to be constructively discharged. For a remedy to exist as a result of a constructive discharge, "the employee must first have a right not to be discharged, which may arise, for example, from some established common-law right, such as a contractual right, from "a well-defined public policy," or from statute…." Kelleher v. Lowell Gen. Hosp. et al, 152 N.E.2d 126, 130-31 (2020) (emphasis added). Or, as stated by the Washington Court of Appeals:

> A discharge may be express or constructive. Either way, it will support a cause of action only if it was *wrongful*. It will not support a cause of action if it was rightful. Consequently, the law does not recognize an action for *constructive* discharge; instead, it recognizes an action for *wrongful* discharge, which may be either express or constructive. A discharge may be wrongful for a number of reasons. It may be a breach of the underlying employment contract (or, in the case of public employment, of the underlying statutorily-controlled employment relationship); it may be a violation of statute; it may be a tort; or it may, conceivably, offend the law in some other way.

Riccobono v Pierce County, 966 P.2d 327, 332 (Wash. Court of Appeals, 1998) (italics in original, other emphasis added).

In this case, the Plaintiff had a right to not be constructively discharged. He was acting in good behavior and had done nothing to justify his employer seeking his termination "for cause," as required by RSA 41:48. Knowing that it did not have good cause to remove him, the Defendant instead forced his termination by making his working conditions so hostile and intolerable that a reasonably person in his position would be compelled to resign. App. at 5-7, ¶¶ 17-22, 25; Porter v. City of Manchester, 151 N.H. 30, 42 (2004). The Defendant's constructive discharge of the Plaintiff from his employment was "wrongful" and illegal, because it amounted to an "end-around" circumvention of the Plaintiff's right to continue in his employment

during good behavior, that the Legislature intended to be guaranteed to him through RSA 41:48.

The Plaintiff is therefore not seeking the creation of new free-standing "constructive discharge" tort claim, but recognition that the doctrine of constructive discharge may apply to an illegal, unjustified termination of a full-time police officer, when his or her employer creates an abusive and hostile work environment intended to circumvent the statutory protection for full-time police officers that is clearly set forth in RSA 41:48. See, e.g., Simpson v. Federal Mine Safety & Health Review Comm'n, 842 F.2d 453, 461 (D.C. Cir. 1988) ("[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly").

CONCLUSION

For the reasons set forth above, the Court should overturn the trial court's decision on the Defendant's Motion to Dismiss, and hold that a police officer who is constructively discharged from his employment in violation of his right to remain employed during good behavior has a cause of action for damages against his employer without any requirement to have a futile hearing to determine if such constructive discharge is justified. To the extent there are any technical infirmities in the Plaintiff's Complaint, he should be permitted to file an Amended Complaint to correct them. See New London Hosp. Assoc. Inc. v. Town of Newport, 174 N.H. 68, 75-76 (2021).

REQUEST FOR ORAL ARGUMENT

The Appellant requests 15 minutes of oral argument to be given by his attorney, Jason R.L. Major.

CERTIFICATIONS

I, Jason R.L. Major, hereby certify that on February 22, 2023, copies of the foregoing and the Appendix were forwarded to opposing counsel, Charles P. Bauer, by electronic service.

I, Jason R.L. Major, hereby certify that the appealed decision is in writing and is included in the Addendum incorporated within this brief, starting at Page 28.

I, Jason R.L. Major, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains less than 9,500 words. Counsel relied upon the word count of the computer program used to prepare this brief.

Respectfully submitted,

JASON BOUCHER

By his attorneys,

LEHMANN MAJOR
LIST, PLLC

Dated: February 22, 2023 By: */s/ Jason Major*___________

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<u>**ADDENDUM TO BRIEF OF PLAINTIFF-APPELLANT**</u>

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STATE OF NEW HAMPSHIRE

CARROLL COUNTY SUPERIOR COURT

Jason Boucher

v.

Town of Moultonborough

Docket No. 212-2021-CV-00061

ORDER ON DEFENDANT'S MOTION TO DISMISS

The plaintiff Jason Boucher brought this action for constructive termination in violation of RSA 41:48 against the defendant the Town of Moultonborough ("the Town"). (Court index #1.) The defendant now moves to dismiss the complaint. (Court index #11.) The plaintiff objects. (Court index #14.) Based on the parties' arguments by pleading, the relevant facts, and the applicable law, the defendant's motion to dismiss is GRANTED.

Facts

The complaint alleges the following facts, which the court must assume to be true for the purposes of this motion to dismiss. See Berry v. Watchtower Bible & Tract Soc'y of N.Y., 152 N.H. 407, 410 (2005). Boucher worked as a police officer for the Town for 19 years, most recently as a Sergeant. (Compl. ¶ 5.) At one point during his career, Boucher assisted other officers in forming a union, which the Town opposed. (Id. ¶ 6.)

In January 2018, the Chief of Police Wetherbee, retired. (Id. ¶ 7.) John Monahan replaced Wetherbee as the Chief of Police. (Id.) Chief Monahan retired in early 2020 and was replaced by David Crawford as Interim Police Manager. (Id. ¶ 8.) Crawford was under direct control of the Board of Selectman ("the Board"). (Id.) According to Boucher, during his tenure,

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Crawford enlisted a lower-ranking officer, Peter John, to "cut [ ] sergeants out of daily operations of the Police Department, turning the chain-of-command upside down." (Id.)

On or about March 16, 2020 Boucher, in his capacity as supervisor, counseled Peter John, a "loyal subordinate" of Crawford, regarding John's "inability or unwillingness to pull his weight on investigations and patrol calls." (Id. ¶¶ 8-9.) Boucher informed John that if he failed to pull his weight, his investigations would be reassigned to the Department's sergeants. (Id. ¶ 9.)

Subsequently, Boucher spoke with Crawford regarding "unexpected and disruptive changes that Crawford had made to overtime rules, some of which were in violation of the officers' collective bargaining agreement." (Id. ¶ 10.) After that discussion, Crawford and John bypassed the chain of command, "with most administrative matters being passed through Detective John to the other officers, bypassing the [s]ergeants." (Id. ¶ 11.)

On May 11, 2020 Boucher received a letter of reprimand concerning his conversations with other officers regarding the negative impact Crawford's management had on the Department. (Id. ¶ 12.) John was both complaining witness and investigating officer. (Id.) According to Boucher, Crawford and John initiated serial internal investigations to "either find something to justify disciplinary action," or to make conditions so intolerable for Boucher that he was forced to resign. (Id. ¶ 17.) Due to Crawford and John's behavior toward him, Boucher's working conditions became so intolerable that he resigned on June 26, 2020. (Id. ¶ 20.)

Legal Standard

When ruling on a motion to dismiss, the Court must discern "whether the allegations in the [complaint] are reasonably susceptible of a construction that would permit recovery." Boyle v. Dwyer, 172 N.H. 548, 553 (2019). The Court assumes all well-pleaded facts in the complaint to be true and construes all reasonable inferences in the light most favorable to the pleading's

proponent. Weare Bible Baptist Church, Inc. v. Fuller, 172 N.H. 721, 725 (2019). The Court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief, must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141–42 (2019). "In conducting this inquiry, [the court] may also consider documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Boyle, 172 N.H. at 553 (quoting Ojo v. Lorenzo, 164 N.H. 717, 721 (2013)). 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 "need not...assume the truth of statements that are merely conclusions of law." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015).

Analysis

The Town moves to dismiss the complaint for failure to state a claim on the following grounds: (1) constructive discharge is not an independent cause of action in New Hampshire (See generally Def. Mot. Dismiss.); (2) Plaintiff's claim under RSA 41:48 is improper because it seeks money damages (Id.); (3) Plaintiff lacks standing to bring a claim (Id.); (4) the allegations in the complaint do not plead or support a wrongful discharge cause of action (Id.); and (5) Boucher failed to exhaust his administrative remedies (Hrn'g 6-20-2022). Boucher objects. (See generally Pl.'s Obj.)

"[S]ubject matter jurisdiction is the tribunal's authority to adjudicate the type of controversy involved in the action." Hemmenway v. Hemmenway, 159 N.H. 680, 683 (2010). "A court lacks power to hear or determine a case concerning subject matter over which it has no

jurisdiction." The court may also raise subject matter jurisdiction *sua sponte*. State v. Demesmin, 159 N.H. 595, 597 (2010).

The legislature has provided a framework for courts to review the circumstances of an officer's termination as Boucher alleges. RSA 41:48 provides:

> Any permanent constable or police officer who is either elected under the provisions of RSA 41:47 or appointed for full-time duty under the provisions of RSA 105:1, and 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. Any such elected permanent constable or police officer shall be deemed to be a permanent policeman, and entitled to benefits under the provisions of RSA 103 if otherwise qualified.

Only after a hearing before the Board may the petitioner appeal to the Superior Court. See id.; See also Ingersoll v. Williams, 118 N.H. 135, 139 (1978) ("The ordinary officer is granted a pretermination hearing, but if he is dismissed, he can have the board's decision reviewed in the superior court . . ."). The court cannot substitute its own judgment for that of the Board, but instead, the court's review is limited to whether the decision was "illegal, unjust or unreasonable." Id. All findings of the Board are prima facie lawful and reasonable. Id. This court's subject matter jurisdiction over an officer's termination, therefore, arises only upon an appeal from the Board's decision.

Generally, parties must exhaust their administrative remedies before appealing to the courts. McNamara v. Hersh, 157 N.H. 72, 73 (2008). This rules is premised "on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency." Huard v. Pelham, 159 N.H. 567, 572 (2009). Boucher appears to assert that he did not need to or was not entitled to a hearing before the Board because he was not discharged, but instead resigned. Boucher, however, does not cite any authority for the proposition that he can circumvent the statutory administrative procedures and assert a claim

directly with the Superior Court, and the court finds no compelling reason to allow him to do so. RSA 41:48 clearly provides that an officer is entitled to a pre-termination hearing before the Board, and as such the Court is unable to "substitute its own judgement for that of the Board. See Ingersoll, 118 N.H. at 139. If Boucher considers himself a terminated officer in violation of RSA 41:48, even if only constructively, it logically follows that he is required to follow the procedures contained within RSA 41:48. Accordingly, the Court finds that Boucher failed to exhaust his administrative remedies, which divests this court of subject matter jurisdiction to decide his case.

Conclusion

For those reasons, the defendant's motion to dismiss is GRANTED, and Boucher's complaint is dismissed without prejudice. Because the court finds that the Court does not have jurisdiction to hear the plaintiff's case, the court need not consider the Town's remaining arguments. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the court need not consider a party's remaining arguments where only one is dispositive of the case.)

SO ORDERED.

Date: August 18, 2022~~August 15, 2022~~

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/19/2022

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