THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0321

American Civil Liberties Union of New Hampshire

v.

New Hampshire Department of Safety, Division of State Police

BRIEF OF UNION LEADER CORPORATION AND THE NEW ENGLAND FIRST AMENDMENT COALITION IN SUPPORT OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE *AMICUS CURIAE*

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November 4, 2022

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CONSTITUTIONAL & STATUTORY PROVISIONS AT ISSUE

CONSTITUTIONAL PROVISIONS

Constitution of New Hampshire, Part 1, Article 8:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings shall not be unreasonably restricted.

STATUTORY PROVISIONS AT ISSUE

N.H. RSA c. 91-A:1 Preamble:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people

N.H. RSA c. 91-A:5 Exemptions:

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petite juries

…

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files

whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

N.H. RSA c. 105:13-b, Confidentiality of Personnel Files:

I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond the finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an *in camera* review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purpose of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding

evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

INTERESTS OF THE AMICI

Union Leader Corporation (hereinafter "Union Leader") is a corporation organized and existing under the laws of the State of New Hampshire and is the publisher of newspapers and other media that are distributed throughout New Hampshire and elsewhere. The New England First Amendment Coalition is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts and it is dedicated to advancing protection for First Amendment and Right-to-Know rights in the six New England states. All parties to this appeal have provided their written consent to the filing of this amicus brief. Copies of those consents are appended hereto in the Addendum to this Brief, (hereinafter "*Add.*") at pp. 125 - 126.

QUESTIONS PRESENTED

1. Did the Trial Court (Kissinger, J.), in its Order of May 3, 2022, (*see Joint Appendix, Volume 1, hereinafter "App. I", at pp. 3-24)* correctly determine that RSA 105:13-b is inapplicable and does not prohibit the disclosure of the public records at issue in this case?

2. Did the Trial Court, (Kissinger, J.) in its Order of May 3, 2022 , (*see App. I. at pp. 3-24)* correctly determine that the privacy interest advanced by the Appellant was outweighed by the public's interest in disclosure?

STATEMENT OF THE CASE AND FACTS

The Appellant, New Hampshire Department of Safety, Division of State Police (hereinafter referred to as the "Division"), seeks to reverse the Order on Petition for Access to Public Records entered by the Superior Court, (Kissinger, J.), on May 3, 2022, granting access to public records sought by Petitioner American Civil Liberties Union of New Hampshire, (hereinafter referred to as "ACLU"). (App. I, pp. 3-24). The petition sought records from the Division concerning a former Trooper, Haden Wilber, (hereinafter referred to as "Wilber"). (App. 1, pp. 25-52). Wilber's employment was terminated by the Division in August of 2021 following an internal investigation relating to Wilber's outrageous conduct toward a citizen in February of 2017. (See Joint Appendix, Volume II (App. II), pp. 267-282). The citizen, Robyn White, (hereinafter referred to as "Ms. White"), was a resident of the State of Maine and was arrested by Wilber following a traffic stop. Following her arrest, Ms. White was incarcerated for thirteen (13) days, initially at the Rockingham County Jail, and subsequently at the Hillsborough and Strafford County Jails. (App. II, pp. 267-282). The ACLU obtained an internal memorandum from the New Hampshire Personnel Appeals Board, (hereinafter referred to as "PAB"), on January 28, 2022. (App. I, p. 4).

That memo recounts that Ms. White had filed a lawsuit against Wilber and others, including the State of New Hampshire in the United States District Court for the District of New Hampshire. (App. II, pp. 267-282). During her incarceration Ms. White was subjected to two body scans, a drug test and invasive vaginal and rectal body cavity searches. Id. These

unconstitutional acts by the government were all caused by the provision of false testimony by Wilber. Id. Ultimately, the State settled Ms. White's lawsuit with a payment of two hundred twelve thousand, five hundred dollars ($212,500.00) from New Hampshire taxpayers' funds. Id. The Division now claims that its records concerning Wilber's employment and termination are exempt from disclosure pursuant to the provisions of N.H. RSA 105:13-b.

SUMMARY OF THE ARGUMENT

This Court has previously decided that N.H. RSA 105:13-b does not preclude Trial Courts from applying the balancing test outlined in N.H. Civil Liberties Union v. City of Manchester ,149 N.H. 437 (2003), and Union Leader Corporation and ACLU v. Town of Salem, 173 N.H. 345 (2020). The public's right to know "what the government is up to" is central and essential to democracy and to the proper administration of justice. Transparency and accountability lead to trust between the citizenry and the government. The need for such trust is critical when the governmental actors are authorized to effectuate arrests and to use force when necessary. The release of the requested materials in this case will ensure that the citizens of New Hampshire are able to fully assess the conduct of a serving police officer and of the thoroughness, timeliness and fairness of those entrusted with the responsibility of overseeing police officers. The public's overwhelming interest in the proper administration of justice clearly outweighs any alleged privacy rights of Wilber and Appellant and the government's speculative interest in non-disclosure.

ARGUMENT

Part I, Article 8 of the New Hampshire Constitution provides that,

> [a]ll power residing originally in, and being derived from, the people, all the magistrates and officers of the government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

RSA Ch. 91-A, also known as the Right-to-Know law, supports and compliments New Hampshire's fundamental interest in fostering open and honest government. The preamble to the Right-to-Know law unambiguously states that,

> [o]penness in conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

RSA Ch. 91-A:1. The fundamental purpose of the Right-to-Know law is "…to provide the utmost information to the public about what its government is up to." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996), (*internal quotations omitted*). Therefore, the courts traditionally consider the Right-to-Know law,

> with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to

> all public documents. Thus, while the statute does not provide for unrestricted access to public records [this Court] broadly construes provisions favoring disclosure and interprets the exemptions restrictively.

Union Leader Corp. v New Hampshire Hous. Fin. Auth., 142 N.H. 540, 546 (1997), (*internal citations omitted*).

While Part I, Article 8 and the Right-to-Know law do establish rights favoring access to the actions, discussions and records of government bodies, such rights are not absolute. RSA 91-A:5, IV exempts the following from disclosure:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy….

When an exemption pursuant to RSA 91-A:5, IV is claimed by a public body the court engages in a balancing test to determine whether the requested materials should be disclosed. In so doing the court must,

> ….evaluate whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know law mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. Next, [the court

> must] assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, [the court must] balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in non-disclosure.

N.H. Right to Life v. Dir. N.H. Charitable Trusts Unit, 169 N.H. 95, 110-111(2016), (*internal citations omitted*). The governmental entity claiming an exemption to disclosure "bears a heavy burden to shift the balance towards nondisclosure." City of Nashua, 141 N.H. at 476. The interpretation of constitutional and statutory provisions is a question of law, which this Court reviews *de novo*. *See* Ford v. N.H. Dep't of Transp., 163 N.H. 284, 291 (2012), (*citing* Billewicz v. Ransmeier, 161 N.H. 145, 151 (2010)).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT RSA 105:13-b DOES NOT PROHIBIT THE DISCLOSURE OF THE REQUESTED RECORDS

RSA 105:13-b does not apply outside the context of a criminal case, and is not a bar to a Right-to-Know request. RSA 105:13-b, by its plain terms, has no bearing on this Right-to-Know dispute because RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. There is no textual ambiguity, therefore no further inquiry is necessary. *See* State v. Brouillette, 166 N.H. 487, 494-95 (2014), ("Absent an

ambiguity, we will not look beyond the language of the statute to discern legislative intent.").

Even if this Honorable Court were to find some ambiguity in the statute, the 1992 legislative history of RSA 105:13-b refutes Appellant's contention that this statute can apply outside the context of a criminal case, including as an exemption to the Right-to-Know Law. RSA 105:13-b's predecessor, House Bill 1359, introduced in 1992, focused upon creation of a process - which previously had been *ad hoc* - for how police personnel file information would be disclosed to defendants in the context of criminal cases. (*See Add. pp. 46-89*). As the Police Chief representing the New Hampshire Association of Chiefs of Police testified after the bill was amended, the bill would address "potential abuse by defense attorneys throughout the state intent on fishing expeditions." (*See Add. p. 81).*

Moreover, the legislature specifically rejected any notion that this statute would apply as an exemption under the Right-to-Know Law or categorically bar police personnel file information from disclosure. The first paragraph of the original proposed version of HB 1359 contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." (*Add. at p.48).* In testimony from January 14, 1992, testifying before the House Judiciary Committee, Charles Perkins, speaking on behalf of Union Leader objected to this blanket exclusion:

> This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as

> men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of misconduct by a police officer …. [I]t will knock a gaping hole in the right-to-know law …. The prohibition in the first paragraph of this bill is absolute.

(Add. at p. 57-58). Following this objection, **the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A**. (*See Add. at p.59*). With this amendment, the title of the bill was changed to make clear that the bill only applied "to the confidentiality of police personnel files **in criminal cases**." (*emphasis added*); (*Add. at pp.70, 72-75)* The amended analysis of the bill similarly explained that the "bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions." (*Add. at pp.60,71,72,74,78*). The amendment to delete the exemption language was apparently a compromise that involved the support of multiple stakeholders that opposed the original bill. (*See Add. at p. 84, noting support of stakeholders for amended version*). The Police Chiefs Association representative acknowledged, following the amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not

going to happen"). (*Add. at p. 81*). The legislature's amendment establishes that the legislature never intended RSA 105:13-b to apply to disputes under RSA Ch. 91-A, and instead intended to limit its reach to criminal cases, under certain circumstances.

As this Court stated in the case of N.H. Ctr. for Pub. Interest Journalism, et al v. NH DOJ, 173, N.H. 648, 656 (2020):

> …the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself…There is no mention of personnel information in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential. If the legislature had so intended, it could have used words to effectuate that intent, such as making confidential all 'personnel information' or all information contained in a personnel file.

Appellant's brief repeatedly and consistently claims that police personnel files are 'strictly confidential'(Appellant's Brief at pp. 14, 15) . However, there is a clear legal distinction between exempt documents and confidential documents under New Hampshire's Right-to-Know law. Records of grand juries and parole and pardon boards are examples of records that are *per se* exempt from disclosure. RSA 91-A:5, I. On the other hand, confidential, commercial, or financial information is only exempt from disclosure if, after a balancing inquiry, a privacy interest outweighs the public's interest in disclosure. *See* Town of Salem, 173 N.H. 345.

Appellant's reliance on RSA 105:13-b to withhold the requested records is misplaced. The law is clear in New Hampshire that confidential

information in personnel files is only exempt from disclosure if, after a balancing inquiry, the privacy interest outweighs the public's interest in disclosure. Id.

II. THE PUBLIC INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS CLEARLY OUTWEIGHS ANY GOVERNMENTAL INTEREST IN NONDISCLOSURE AND THE ALLEGED PRIVACY INTERESTS OF WILBER

"[B]ad things happen in the dark when the ultimate watchdogs of accountability – i.e. the voters and taxpayers – are viewed as alien rather than integral to the process of policing the police [and other government agencies]." Union Leader Corporation et al v. Town of Salem, No. 218-2018-cv-01406 (Rockingham Super. Ct., April 5, 2019), (Schulman, J.). (*See Add. at p. 92*). New Hampshire's Right-to-Know law is modeled after the Freedom of Information Act, which was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1975) (*internal citations and quotations omitted*). Under New Hampshire's Right-to -Know law the "disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government." City of Manchester, 149 N.H. at 440. "Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know law." New Hampshire Hous. Fin. Auth., 142 NH at 554,

(*quoting* Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989)).

The Supreme Court of Connecticut, in the case of Perkins v. Freedom of Information Commission, 228 Conn. 158 (1993), utilized the Restatement of Torts 2d, section 652D, to establish the standard to be used in the context of balancing claims of privacy and the public's right to access governmental records. The Restatement provides that governmental records may be subject to closure if the matter:

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

The release of the requested records will shed light on Appellant's performance of its constitutional and statutory duties. The contents of the requested records will reveal pertinent information about Appellant's employee's conduct while performing his public duties and about the thoroughness and timeliness of the Appellant's investigation and action taken, or not taken, upon its receipt of information concerning Wilber's on-duty conduct. The Division does not claim that the government has any interest in non-disclosure, (App. I, p. 18), and the Trial Court correctly held that that Wilber has "no substantial privacy interest in information relating to the performance of his official duties (App. I, p. 19), and that any other privacy interest he may have is "minimal" (App. I, p. 23). In balancing the interests of the parties, the trial court correctly concluded that the records should be disclosed.

III. INTERPRETING RSA 105:13-B AS CREATING SPECIAL CATEGORICAL SECRECY PROTECTIONS FOR DISCIPLINARY INFORMATION IN POLICE PERSONNEL FILES (WHICH IT DOES NOT CREATE) WOULD DEPRIVE THE PUBLIC OF MISCONDUCT INFORMATION THAT HAS BEEN RELEASED IN NEW HAMPSHIRE SINCE MAY 2020.

- Since May 29, 2020, the public and press are now obtaining access to misconduct information previously unavailable during the 1993-2020 Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) era. Through this access, the public has had a greater ability to learn about what the government is up to and, where appropriate, hold agencies more accountable. This released information, as detailed by New Hampshire press outlets, includes the following:
- In September 2022, the City of Manchester released information concerning the Manchester Police Department's investigation into an officer's sustained misconduct where he, while on duty in February 2021, texted other officers a meme that made a "joke" out of the May 2020 murder of George Floyd and included the phrase "Black Love." The officer admitted to "conduct unbecoming of an officer," and he was suspended for three days and ordered to undergo sensitivity training.[1]

[1] *See* Mark Hayward, "Cops Who Received Floyd Text Want Their Names Kept Secret," Union Leader (Sept. 9, 2022), https://www.unionleader.com/news/courts/cops-who-received-floyd-text-want-their-names-kept-secret/article_55e05f59-3542-5269-864f-9745355c6c5f.html. (*Add. p. 89).*

- In October 2020, the City of Manchester publicly released information concerning the sustained misconduct of an officer who sent racist comments to his wife on a department-issued cell phone. This information included an arbitrator's report that reversed the Manchester Police Department's April 2018 decision to terminate the officer and ordered reinstatement with back pay.[2]
- In October 2020, the State Police—taking a position of transparency that apparently is inconsistent with the position taken in this case—produced internal affairs information concerning the misconduct of a terminated state trooper. This former trooper was alleged to have, while on-duty and conducting an investigation, falsified date information on a DSSP 20 Lab Transmittal Form. (*See* App. I, pp. 215-222).
- In May 2022, the Dover Police Department released an internal report documenting its investigation into the actions of an officer it terminated on April 7, 2021. The PSTC ultimately decertified this officer on January 25, 2022 in the wake of his dishonesty about a deadly chase he initiated, which ended in the deaths of two men.[3] After his termination

[2] *See* Mark Hayward, "Fired Cop Aaron Brown: I Might be Prejudiced, But Not Racist," *Union Leader* (Oct. 27, 2020), https://www.unionleader.com/news/safety/fired-cop-aaron-brown-i-might-be-prejudiced-but-not-racist/article_25d480f3-4a45-5c35-823e-8485dc0028e4.html. (*Add. p. 96).*

[3] *See* Josie Albertson-Grove, "Dover Cop Decertified After Dishonesty About Deadly Chase," *Union Leade*r (Feb. 3, 2022), https://www.unionleader.com/news/safety/dover-cop-decertified-after-dishonesty-

from the Dover Police Department in April 2021—and before he was decertified by the PSTC on January 25, 2022—the officer was rehired by the Lee Police Department on July 2, 2021.[4]

- In August 2021, after being ordered by the Rockingham County Superior Court (St. Hilaire, J.), the Salem Police Department released investigatory materials concerning the 2012 actions of an off-duty police sergeant who evaded fellow officers in a high-speed chase down Route 28 in Salem. This chase was apparently never reported to prosecuting jurisdictions. The officer was disciplined with a one-day unpaid suspension.[5]
- In June 2021, the City of Lebanon released information concerning an officer who had been charged with using fictitious online accounts to stalk a former girlfriend and threatening to release details about their sexual encounters.[6]

about-deadly-chase/article_f429e641-e810-5cd3-b31c-d353fbd816a1.html. (*Add. p. 106*).

[4] *Id.* (*Add. p. 106).*

[5] Ryan Lessard, "Court Releases 2012 Internal Affairs Review of Salem Police Sergeant," *Union Leader* (Aug. 11, 2021), https://www.unionleader.com/news/crime/court-releases-2012-internal-affairs-review-of-salem-police-sergeant/article_f2f07e3d-5d16-5e6c-a65e-76153f9134a3.html. (*Add. 109*).

[6] *See* Anna Merriman, "Lebanon Police Lieutenant Charged with Stalking Ex-Girlfriend," *Valley News* (May 7, 2021), https://www.vnews.com/Lebanon-police-officer-charged-with-stalking-ex-girlfriend-40357816. (*Add. 111*).

- In October 2020, the Dover Police Department released an internal investigation into a fired officer who the State subsequently criminally charged—an investigation that identified physical altercations, improper use of his Taser while off-duty, smoking marijuana, theft of evidence and improper storage of evidence in his locker.[7] The officer was subsequently acquitted.[8]
- In September 2020, following this Court's decision in Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325 (2020), the City of Portsmouth produced an arbitrator's report concluding that a Portsmouth police officer was poorly managed and improperly fired in 2015 during a dispute over his $2 million inheritance from an elderly resident, entitling him to two years of back pay.[9]

[7] *See* Kimberly Haas, "Dover Released Review of Investigation Into Fired Officer," *Union Leader* (Oct. 29, 2020), https://www.unionleader.com/news/safety/dover-releases-review-of-investigation-into-fired-officer/article_1f13e35e-d774-5f1e-b2d8-4f22d5b3a191.html. (*Add. p. 115*).

[8] *See* Megan Fernandes, "Ex-Dover Police Officer R.J. Letendre Not Guilty in Felony Trial. What the Verdict Means," *Foster's Daily Democrat* (Feb. 18, 2022), https://www.fosters.com/story/news/2022/02/18/r-j-letendre-ex-dover-police-officer-found-not-guilty-in-felony-trial/6819336001/. (*Add. p. 117*).

[9] Elizabeth Dinan, "Ruling: Portsmouth Officer Fired Improperly Over $2M Inheritance, Owed 2 Years Pay," *Seacoast Newspapers* (Sept. 28, 2020), https://www.seacoastonline.com/story/news/2020/09/28/ruling-portsmouth-officer-fired-improperly-over-2m-inheritance-owed-2-years-pay/114157858/. (*Add. p. 121*).

If this Court were to adopt the State Police's interpretation of RSA 105:13-b, then this type of information would never see the light of day.

CONCLUSION

For the reasons addressed above, and in the brief of the Petitioner/Appellee ACLU, Union Leader Corporation and the New England First Amendment Coalition respectfully request that this Honorable Court affirm the May 3, 2022 Order of the Trial Court (Kissinger, J.), and order Appellant to release the requested records to the Appellee, and grant such other and further relief as this Court deems just.

Respectfully submitted,
Union Leader Corporation
and New England First
Amendment Coalition,
by their attorney,

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Dated: November 4, 2022

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26, this brief complies with the provisions of New Hampshire Supreme Court Rule 26. Counsel hereby certifies that this brief complies with New Hampshire Supreme Court Rule 16 (11) that provides that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, table of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other matters." Counsel hereby certifies that this brief contains 3,684 words, (including footnotes), from the "Interests of the Amici" to the "Certificate of Compliance".

/s/ *Kathleen C. Sullivan*
Kathleen C. Sullivan
N.H. Bar No. 14797

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that Brief of Union Leader Corporation and The New England First Amendment Coalition, *Amicus curiae*, was served on November 4, 2022, through the electronic-filing system upon counsel for the Respondent/Appellant, New Hampshire Department of Safety, Division of State Police (Jessica A. King, Esq.),and Petitioner/Appellee American Civil Liberties Union of New Hampshire (Gilles Bissonnette, Esq. and Henry Klementowicz, Esq.).

/s/ *Kathleen C. Sullivan*
Kathleen C. Sullivan
N.H. Bar No. 14797

ADDENDUM

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HOUSE

040091
A-045-09

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1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

3732L
92-2419
09

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as

confidential and shall be returned to the police department employing the officer.

2 Effective Date. This act shall take effect January 1, 1993.

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING on HB 1359

BILL TITLE: Requiring confidentiality of personnel files of local police officers except in certain criminal cases.

DATE: January 14, 1992

LOB ROOM: 208 **Time Public Hearing Called to Order:** 10:30 AM

(please circle if absent)

Committee Members: Reps. Martling, Lown, Jacobson, C. Johnson, Lozeau, Moore, N. Ford, Lockwood, Bickford, Hultgren, Record, R. Campbell, Nielsen, Dwyer, D. Healy, Burling, Baldizar, D. Cote, Wall and DePecol

Bill Sponsors: Rep. Burling, Sullivan District 1; Rep. Record, Hillsborough District 23

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

REP. ALICE RECORD, Hillsborough District 23, Co-Sponsor: Spoke in support of bill. This bill is submitted at the request of a chief of police. It is a problem for police departments. Files of police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

*CHIEF OF POLICE DAVID BARRETT, NH Association of Chiefs of Police: Spoke in support of this bill. In a case he had recently, the judge allowed a defense attorney to obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure. It is an abuse. Since that case, 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of police officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers, including psuchological evaluations and many, many things that are not appropriate to be seen by the public.

NINA GARDNER, NH Judicial Council: Spoke in support of the bill. This bill guarantees that the privacy of the personnel file of the police employee be maintained.

EDWARD KELLEY, Manchester Police Patrolmen's Association: Spoke in favor of this bill. He has seen cases of defense counsel requesting the file of a police officer to be able to discredit the police officer's testimony. Information from this file goes through the entire life of the officer, and much of this information is not germaine to the case. Yet this information is used by defense attorneys to discredit the officer. This is inappropriate, and in violation of the privacy of personal information. There are reprimands

in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

JIM McGONIGLE, JR., NH Police Association: Spoke in favor of this bill. The right of privacy of the police officers' files are already protected by RSA 91:a; however, there are many abuses of this statute by defense counsel. He feels a judge should review the file in camera alone. If the judge finds there is reason to give the file to defense, then he would do so. Mr. McGonigle does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not constitutionally denied.

CLAIRE EBEL, NH Civil Liberties Union: Spoke in favor of the bill because the rights of privacy of police officers are already protected by law.

*CHARLES PERKINS, "The Union Leader": Spoke opposing the bill. This bill gives special privileges and rights to police. The public's right to know outweighs certain rights of the police officer's right to privacy. The prohibition in this bill takes away the public's right to know.

APPEARING IN SUPPORT OF THE BILL, BUT NOT TESTIFYING:
LOUIS COPPONI, NH Troopers Association
MATT SOCHALSKI, NH Association of Fire Chiefs
DOUG PATCH, NH Department of Safety

Respectfully submitted,

C. William Johnson

C. William Johnson, Clerk

26149

Public hearing Judiciary Committee January 14, 1992 10 30 AM
HB 1359, requiring confidentiality of personnel files of local police officers except in certain criminal cases.
Sponsors: Rep. P. Burling Sull. 1 Rep. A. Record Hills. 23

Sponsor Rep. Alice Record in support of bill. This bill put in at request of a Chief of Police. It is a problem for for Police departments. Files of Police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

Chief of Police David Barrett, N.H. Association of Chiefs of Police in support of this bill. In a case he had recently the judge allowed a defense attorney ~~to~~ obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure It is an abuse. Since that case 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of Police officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers including psychologic evaluations and many, many things that are not appropriate to be seen by the public. (See file for additional written testimony.)

Nina Gardner N.H. Judicial Council in support of the bill. This bill guarantees the privacy of the personnel file of the police employee be maintained.

Page 1

Edward Kelley, Manchester Police Patrolmans Assoc in favor of this bill. He has seen cases of defense Council requesting the file of a police officer to be able to discredit the police officers testimony. Information from this file goes through the entire life of the officer and much of this information is not germane to the case and yet this information is used by defense attorneys to discredit the officer. This is inappropriate and in violation of the privacy of personal information. There are reprimands in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

Jim McGonigle Jr. N.H Police Association in favor of this bill. The right of privacy of the police officers' files are already protected by RSA. 91a, however, there are many abuses of this statute by defense Council. He feels judge should review the file in camera alone. If he finds there is reason to give the file to defense then he would do so. He does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not Constitutionally denied.

Claire Ebel, N.H. Civil Liberties Union. In favor of the bill because rights of privacy of police officers are already protected by law.

Charles Perkins, "The Union Leader" in opposition of the bill. This bill gives special privileges and rights to police. (See written notes for testimony) The publics right to know outweigh certain right of the police officers right to privacy. The prohibition in this bill takes away the ~~right~~ publics right to know.

HB 1359

Appearing in support of the bill but not testifying

Louis Copponi, N. H. Troopers Association
Matt Sochalski, N. H. Association of Fire Chiefs
Doug Patch, ~~D~~ N. H. Department of Safety.

Respectfully Submitted
Rep. C. William Johnson
Clerk -

HB1359 N.H. Assoc. of Chiefs of Police Testimony Chief David Barrett

On the surface, this case appears to be reasonably innocuous. As such, I have absolute respect for your Honor's discretion and judgment. However, history has shown us time and time again that reasonably insignificant and narrowly focused decisions have a habit of replicating themselves in a broader fashion. In fact, how many times have we in this room asked ourselves "How did we get to this point? Could this have been the intent when the original decision was rendered? Or for that matter, when the Constitution was penned?"

Defense Counsel have an obligation to zealously represent their clients and to insure the preservation of their Constitutional rights. But what about the rights of the police officer or employee and his or her family? Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with the responsibility of keeping the peace, preserving the rights of the citizens, and occasionally apprehending offenders, should have to expose his personnel file for merely doing his or her job.

I believe this decision opens the door to potential abuse by defense attorneys throughout the State intent on fishing expeditions. It strikes me that, absent any facts to show that the personnel file might contain legitimate foundation for an attack on an officer's credibility and veracity, this Defendant's Motion is meant to do nothing more than embarrass this officer and invade his privacy.

Without sounding like I have read too much George Orwell, would it be fair for me to conclude that, given the potential for abuse, in six months, two years or five years, we as police managers will be reluctant to discipline employees for fear that, as a matter of routine, any time a defense attorney gets a tickle that an arresting officer may have been subjected to a disciplinary action, that, upon review, that action can be so broadly construed so as to impugn that officer's credibility?

Conversely, could this situation manifest to such a degree that an employee who might normally accept a disciplinary action, create an additional burden on the hiring authority by grieving and appealing any disciplinary action for fear it may become a public record?

When an offer of employment is made, there is an expectation on the part of the employee that we, the employer, will maintain the privacy and confidentiality of personal financial, psychological and physical matters. At what point are the Constitutional rights of the Defendant of more import than that of the rights of an employee who has done no wrong.

Police Officers, as a class of employees, have become viewed by the State of New Hampshire as second class citizens. The Supreme Court has said that we do not have the right of civil redress. The Legislature has voted against bills for enhanced penalties for assaulting a police officer. Now we are addressing the Court on the issue of their right to privacy. All of these are rights guaranteed to every citizen of this State yet denied to us the minute we assume our professional roles. Am I to assume that an officer, acting in his or her appointed capacity, has deemed to have given up his or her Constitutional rights? With all due respect to your decision in this matter, the slightest broadening of this decision by others down the road can only lead to the further erosion of the Constitutional rights of police employees.

I would like to request of this Court that, since I have personally generated the majority of the material contained in this personnel file, it be willing to accept my word and representation that there is absolutely nothing in this file that could impugn the integrity or credibility of Officer Jaillet. Beyond that, it is my opinion that I am merely the keeper of the file, and the contents therein are the property of the employee. I would like this Court to know that I have a signed letter by Mr. Jaillet dated May 6, 1991 asking that I not release his file. Since, however, the Court has Ordered me to do so under threat of contempt, I am hereby surrendering former Officer Jaillet's personnel file.

Respectfully Submitted

_____

David T. Barrett
Chief of Police
Jaffrey, N.H.

HB 1359 COB 208 HB 1359 10/1/14

testimony of Charles Perkins "Union Leader newspapers"

TOP OF STORY<
Good morning. My name is Charles Perkins. I am the managing editor of The Union Leader and the New Hampshire Sunday News.<EOP>

This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of misconduct by a police officer.<EOP>

Such a change in state law is not in the best interests of the state at large, nor is it in the best interest of the state's police.<EOP>

While the intent of this bill may be benign, if enacted it would prove divisive. By giving special privileges and protections to New Hampshire's police, it will invite other groups of municipal employees to demand equal treatment. It will unnecessarily endanger the high regard in which New Hampshire residents hold their police officers. And it will knock a gaping hole in the right-to-know law.<EOP>

The New Hampshire right-to-know law is not a statute which strips police or public employees of their privacy. It is not a law which allows pesky reporters or busybodies to rummage through the personnel files of police officers at will. Instead, it effectively and properly keeps confidential the vast majority of public employee personnel files and protects the privacy of law enforcement officers. As written by the Legislature and as interpreted by the state's highest court in the past quarter-century, the right-to-know law does empower the state's judiciary to weigh the sometimes conflicting interests of public employees and of inquiring citizens in determining what records shall be private, and what shall be public.<EOP>

In the precedent-setting Mans v. Lebanon School Board case of 1972, the New Hampshire Supreme Court ruled that in right-to-know cases involving personnel records of public employees, the trial court must balance the benefits of disclosure to the public against the benefits of nondisclosure.<EOP>

That isn't an open-door policy. It is a sensible rule. It is not arbitrary. It works, because it is fair, and flexible. It allows a Superior Court judge to determine if the limited release of information about an employee is or is not in the public interest. Should the judge's decision be unacceptable to the employee, he or she can appeal. This system is a carefully crafted test that has served the state well for twenty years.<EOP>

In practice, police already have special treatment from judges in New Hampshire to shield their personnel records. As an example, in the continuing case of Union Leader Corporation v. Dover Police Department, Judge Michael Sullivan refused this newspaper's request for schedules and pay records, citing Chief William Fenneman's testimony about the risks that release of that information would pose to his officers and to public safety. That was a request for special treatment for police officers. The current law allows it. The system worked.<EOP>

In that case, which is now on appeal to the state Supreme Court, Judge Sullivan did order the release of an internal investigation and of disciplinary action taken against one officer, ruling that the public's right to know outweighs that officer's wish to keep his violation secret.<EOP>

The judge applied a balancing test. He found that some information should be protected, due to the nature of police work. He found that other information should be released to the public.<EOP>

If House Bill 1359 passes, the Legislature will be telling Judge Sullivan

scrutiny in all but a handful of criminal cases is preferable to a system in which the public's right to know is weighed against an officer's right to privacy. The Legislature will be telling the courts that even if the case for release of this information to the public is clearcut, even if it is overwhelmingly in the interest of the police department involved, it can't be done. The prohibition in the first paragraph of this bill is absolute.<EOP>

That is not good public policy. Don't tie the hands of our judges with this bill. I urge you to consider the full impact of this legislation, because I believe that once you do, you will vote to kill it.

Records at req of one police chief

- secured by request of an attorney.

Chief Barrett - Taffney (Paul) s/s decision could lead to defense fishing expeditions.

Felony DUI in motion - def counsel req officer's personal file

"rumor on the street met the standard of the inv. of privacy"

pretty dangerous precedent - would start to see pattern

60/70 times since - req to subpoena personal file. Kyles standard.

expect to see personal file for violation. -

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer or fire ~~officer~~ ~~who is~~ or designee who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department or fire department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE COMMITTEE JUDICIARY

Public Hearing on (HB)/SB # (please circle one): 1359

Bill Title:

Date:

L.O.B. Room #: 208 Time Public Hearing Called to Order: 10 30/A.

(please circle if absent)

Committee Members: Reps. Martling, (Lown,) Johnson, (Jacobson,) (Lozeau) Ford, (Bickford,) Record, Nielsen, (Healy,) Cote, (Wall,) (Moore,) Lockwood, Hultgren, Campbell, (Dwyer,) (Burling,) Baldizar, (DePecol.)

Bill sponsors:

Testimony

* Use asterisk if written testimony and/or amendments are submitted.

Speaker and Comments:

HOUSE COMMITTEE JUDICIARY

Executive Session on (HB)/SB # (please circle one): 1359

Bill Title:

Date: 2/5/92

L.O.B. Room #: 208

(please cirlce, if absent)

Committee Members: Reps. Martling, Lown, Johnson, Jacobson, Lozeau, Ford, Bickford, Record, Nielsen, Healy, Cote, (Wall) Moore, Lockwood, Hultgren, Campbell, Dwyer, Burling, Baldizar, (DePecol)

OTP, (OTP/A), ITL, Re-refer - (please circle one)

Motion:

Moved by Rep. Burling

Seconded by Rep. Lockwood

Vote: 17-1 (Please attach record of roll call vote)

Motion:

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote)

HOUSE COMMITTEE: JUDICIARY

Executive Session on (HB)/SB # (please circle one): 1359

Date: 2/5/92

Consent Calendar: Yes ✓ Vote: 18-0 No ____ Vote: ____

(requires unanimous vote)

Committee Report: (please fill out committee report slip in duplicate)

Respectfully submitted,

Rep. C. William Johnson, Clerk

JUDICIARY 1991-1992 SESSION

HB Bill # 1359

Public Hearings 1/14/92 Executive Session 2/5/92

COMMITTEE REPORT: OTP/A

	YEAS	NAYS
Martling, W. Kent, Ch.	✓	
Lown, Elizabeth D., V. Ch.	✓	
Jacobson, Alf E.	✓	
Johnson, C. William	✓	
Lozeau, Donnalee M.	✓	
Moore, Elizabeth A.	✓	
Ford, Nancy M.	✓	
Lockwood, Robert A.	✓	
Bickford, Drucilla	✓	
Hultgren, David D.	✓	
Record, Alice B.	✓	
Campbell, Richard H., Jr.	✓	
Nielson, Niels F., Jr.	✓	
Dwyer, Patricia R.	✓	
Healy, Daniel J.	✓	
Burling, Peter H.	✓	
Baldizar, Barbara J.	✓	
Cote, David E.		✓
Wall, Janet G.		
DePecol, Benjamin J.		
TOTAL VOTE	17	1

Appeared in Favor	Appeared in Opposition

20659
0775T

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: 1359

DATE: 2/5/92 CONSENT CALENDAR: YES ✓ NO ____

OUGHT TO PASS ____

OUGHT TO PASS WITH AMENDMENT ✓ 17-1

INEXPEDIENT TO LEGISLATE ____

RE-REFER TO COMMITTEE (1st year session) ____

REFER FOR INTERIM STUDY (2nd year session) ____

VOTE: 17-1

STATEMENT OF INTENT

This bill was submitted in response to growing evidence that police personnel files are being used for "fishing expeditions" in the course of criminal trials, the purpose of the fishing expedition being to deter or delay criminal prosecutions. The bill as amended by the committee provides an effective and appropriate standard for court review of personnel files, and preserves the important confidentiality which police personnel files require.

The FN calls for state expenditures of $ ____ in FY '91 and $ ____ in FY '92. The Committee amendment increases/decreases House expenditures.

Elizabeth D. Cowan
Signature

Original: House Clerk
cc: Committee bill file

LEG021

USE ANOTHER FORM FOR MINORITY REPORT

1457/02

HOUSE BILL 1359

Judiciary
Committee

for the Committee

Committee

for the Committee

CHAIRMAN'S COPY

GRESS CHART

BY H DATE FEB 12 1992 FLOOR ACTION TAKEN OPPW/A COMMITTEE Judic AMENDMENT DOCUMENT# 4648 ASST. CLERK'S INITIALS

BY S DATE 3-26-92 FLOOR ACTION TAKEN OTP COMMITTEE Judic AMENDMENT DOCUMENT# - ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

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BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

LEG022

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

CHAIRMAN'S COPY

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Due Date: 2/26/92

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as

confidential and shall be returned to the police department employing the officer.

2 Effective Date. This act shall take effect January 1, 1993.

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

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HOUSE BILL AMENDED BY THE HOUSE

3732L
92-2419
09

HB 1359

STATE OF NEW HAMPSHIRE
In the year of Our Lord one thousand
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AN ACT
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2 Effective Date. This act shall take effect January 1, 1993.

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09

HOUSE BILL - FINAL VERSION

1992 SESSION

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

- -

EXPLANATION: Matter added appears in ***bold italics***.
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HOUSE BILL - FINAL VERSION

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

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2 Effective Date. This act shall take effect January 1, 1993.

SENATE

1992 HB 1359

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A-045-09

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HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

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This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

- -

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HB 1359

HOUSE BILL AMENDED BY THE HOUSE

- 1 -

3732L
92-2419
09

HB 1359

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2 Effective Date. This act shall take effect January 1, 1993.

DATE: March 11, 1992
TIME: 11:36 a.m.
ROOM: 103, LOB

The Senate Committee on Judiciary held a hearing on the following:

HB 1359: relative to confidentiality of police personnel files in criminal cases.

Committee members present:

Senator Podles, Chairman
Senator Hollingworth, Vice Chairman
Senator Colantuono
Senator Nelson
Senator Russman

Senator Podles opened the hearing.

Rep. Alice Record, Hills D 23: This is something that has proved to be very much of a problem to the police around. In opening the files of somebody who is to testify, the information that is in the police files on their special officers, or people who work for the different police departments who have to come out as a witness, testify to an arrest or what have you. It seems that we already do have on the books that says they shall not open these files, but the judges have said it is not explicit enough. So therefore they are opening the files on the police officers. The information included in the files of the personal life of these men is very different than it is in a company. Sanders Associates, or Digital or any of those have a file that has color, race, creed, and those things have been eliminated that they can no longer have too. But in the police files, they have a total record of these men who have been hired by the police department. And it is something that is very dangerous in my estimation of their opening these files. This allows for the judge to open the file in camera and decide whether there is anything in the file contradictory to testimony that might be given by a police officer. And if there is nothing relevant to a particular case, he orders the files closed again, but it does not become public property. Peter and I feel very strongly about this. And we put this in on behalf of Chief Barrett. There have been different problems within the police departments. I would be happy to answer any questions.

Chief Barrett, Police Chief, Jaffrey: I am here as the legislative representative and chair of the New Hampshire Association of Chiefs' of Police. As Representative Record pointed out, we, the Chief's Association, came to her and Representative Burling. First we explained our problem and then we asked if they might be willing to sponsor a bill which they gladly did after we explained the nature and the kinds of problems that we have had. This has come up as a result of some actions that have taken place in certain district and particularly superior courts throughout the state in the last year. I think the case that I had personally was the one that kind of set the wheels rolling. I was concerned at the time that it might do that if I put up much of a stink, which I did. Of course, it ultimately came down to a test of will and the fellow with the black robe won as he appropriately should. But I would like to share with you some of my testimony before the court that day

and explain to you some of the things that subsequently took place. On the surface, that case appeared to be reasonable innocuous. However, history has shown us time and time again that reasonable insignificant and narrowly focused decisions from the bench have a habit of replicating themselves in much broader fashion. In fact, how many times have we, in this very room, asked ourselves how did we get to this point. Could this have been the intent when the original decision was rendered, for that matter, when the constitution was penned. Defense council has, and I would defend their right to do so, an obligation to zealously represent their clients and to insure preservation of their client's constitutional rights. But what about the rights of a police officer who are employed and his or her family. Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with keeping the peace, preserving the rights of the citizens and occasionally apprehending the offender should have to expose his personnel file for merely doing his job. That is what happened in that case. I believe the decision opens the door to potential abuse by defense attorneys throughout the state intent on fishing expeditions. It strikes me that absent any facts to show that a personnel file might contain legitimate foundation for an attack on the officer's credibility and voracity, that a defendant's motion is meant to do nothing more than embarrass an officer and invade his privacy. I would like to point out that subsequent to the case that I am making reference to, as I had foreseen, this matter has come up 38 times in less than a year. We have even seen it come up in the district court for violations. Fortunately, the two courts that it has come up in the district court level, the judges have ruled appropriately that it is not their perview. But, it seems to us that it is pretty clear that since the door got opened, this has become a regular course of conduct. I should point out to you that in the case that brought this all to light, the court ruled that a sufficient showing existed that there may be some concern about the office who was merely testifying about an arrest that he made, of the officer's credibility and voracity. I accepted that on the surface, but in open court, I found out the standard that was set was, as it was represented by defense council, that in the case at hand that created this, rumor on the street and it is straight from the transcript (and I have the transcript) constituted enough for the court to rule in favor of viewing this officer's personnel file. I submit, if we could get search warrants based on rumor on the street, we would be doing 50 or 60 of them a week. It seems to me that an officer, or any police employee, who has taken his responsibility seriously, has agreed to go through the kind of selection process that is required today to become a police officer, and once he raises his hand and is sworn in to protect the citizens of this state and enforce the laws appropriately that at no time should he be expected to have given consent to abrogate his rights under the constitution of the United States or the state of New Hampshire. And that is what has happened in this case. I submit to this committee that no one in no other walk of life would have to open up their personnel files for any reason such as doing their job. And that is what happened in this case. The officer did nothing but his job. By the way, I would like to report to you that in the case at hand which started this whole ball rolling, the judge ruled there was nothing in the file. We offered that. We said there was nothing in the file, but they had to go see for themselves. At any rate, this does set up some rules and some parameters. Frankly, I would like to see an absolute prohibition, but since I realized the tooth fairy died some time ago, that is not going to happen. But this does at least set some parameters. I spoke to Representative Burling, and because of vacation, he is unable to be here. I do have a copy of the letter he sent to the Chair, and I think it pretty well

outlines that. I would like to also share with you, without belaboring the point, some of the things that you might find in a personnel file. If the police agency is doing their job, like I would like to believe most of us do, you are going to find initial written test scores, physical agility exams, you are going to find psychological profiles in there. And I don't frankly think that is something that should be shared with many people. You are going to find financial documents and records, because we do credit checks on our prospective employees. You are going to find counseling, you are going to find family matters that have come up and created some kind of interference with their performance and if we as good police administrators are doing our job, we will in fact have that material in there because we have to insure the credibility and the performance of our employees. You are going to find the kinds of things that you won't find in the average working person's file. I don't know many occupations that require psychological profiles. Those things are all contained in a personnel file. And it seems to me that the average person should expect some privacy on those issues. I could go on because obviously I feel very strongly about this, but I will defer to any questions.

Senator Thomas Colantuono, D. 14: I am just curious how you envision this working. It says the sitting judge has to make a specific ruling that probable cause to exist. How does the judge make that ruling? What constitutes probable cause and could rumor on the street be enough?

Chief Barrett: Certainly in my view it wouldn't and I would hope in yours as an attorney that that doesn't make the standard of probable cause. But what happened absent this, in the case that started this, is there was no requisite of probable cause. Sufficient showing was the dialog that was used. Probable cause, as we know - those of us who operate in the system, is a standard that has to be met. I always liken it to the early days in my career that if you have 100 percent, you have to have at least 51 percent to meet the probable cause standard if you were going to break it up into percentages of all these things put together. The totality of those issues that may be raised, you would have to at least be 51 percent. Certainly, I would like to believe that rumor on the street does not constitute anybody's interpretation of probable cause. I am told from the Judicial Council, one of the reasons they like the concept is because it sets some rules which didn't exist before. I would say that we are going to have to rely on the judiciary to appropriately deal with what constitutes probable cause.

Senator Thomas Colantuono, D. 14: Where you might get most of these cases is on assault situations, where someone is charged by a police officer and the defense is going to be "I was just defending myself, he hit me first." And whether it is rumor on the street or just well known in the community that that police officer has had two or three internal investigations for abusing citizens, that is highly relevant. That is my question. How do you get that in front of a judge so that a judge can say, "I think we should look at that."?

Chief Barrett: I don't have an answer for you, but I would say, however, that the instance of cases that have come up since this was started, only 1 of them was an assault case. This one was on a felony DWI case, which had nothing to do with assault.

Senator Mary S. Nelson, D. 13: I just want to follow up on Senator Colantuono's question. I was thinking the same thing, contains relevant

evidence, how is the judge going to determine that there is evidence relevant to the criminal case. And how is an attorney going to get that before the judge? How are you going to do it? Are you going to go to the judge, write him a letter, petition him?

Chief Barrett: Are you talking about defense counsel? How are they going to do it?

Senator Mary S. Nelson, D. 13: Any lawyer that wanted to get this information, I don't know what you call it, but you want to go before the judge and you want them to. How do they do it now?

Chief Barrett: They would file a motion. They would make some offer of proof so far as they understand it and the judge is either going to say this meets the standard or it doesn't.

Senator Mary S. Nelson, D. 13: And if this law is passed, they can do that?

Chief Barrett: They should be able to do that.

Senator Mary S. Nelson, D. 13: What would stop them from doing that? Is there anything in this statute that prevents them from doing that?

Chief Barrett: Not that I am aware of. They can file a motion. What this does is set some rules that you have to at least follow before that happens. Before we just arbitrarily say I want to look at this guy's file.

Senator Mary S. Nelson, D. 13: I don't see what the rules are?

Chief Barrett: The rule says that it has to be the matter at hand, and it has to meet some probable cause standard. Absent this legislation, we have found that there was no standard and if you don't meet any standard it can be at will. Like in the case we had where rumor on the street met the standard. I don't think rumor on the street should be the standard.

Senator Mary S. Nelson, D. 13: So particular piece of legislation would help in preventing rumor on the street?

Chief Barrett: Absolutely. I don't know of any legal mind that would say that constitutes probable cause. If it is, as I said, we would be doing search warrants every day of the week, if that is all you have to do to meet a probable cause standard.

Senator Beverly Hollingworth, D. 23: Probably the standard of probable cause would answer this but I am thinking of the Cushing case, where the police officer killed Mr. Cushing and all the records indicated they had a hard time getting those records. But when they were released, then it became known that he had problems. In that case, under this, perhaps his record would be able to be achieved because they could prove that there was cause.

Chief Barrett: It would be incumbent on the prosecutor to meet a probable cause standard. Whoever wants the records has to meet some standard and they have to say this constitutes probable cause. Ultimately the decision is the judge's. That is the way it always is on everything. The judge is going to rule whether that standard has been met or not. Some judges are going to, in

their practice or application, their standard may be higher than another judge. We know that is true in every case we take before the court. Some courts see the standards for anything different than others. I am sure counsel will both agree to that. They all have their own way of viewing it. That is going to vary from court to court because you are still leaving it up to the bench to decide when you have met that threshold. When you have passed the threshold and have met the probable cause standard. Would this correct that problem? I don't want to say yes or no. It certainly would have set some standard in that case which doesn't exist now. That judge may have seen that as a much higher threshold to meet than the one I had.

Senator Beverly Hollingworth, D. 23: One of the things it says is "only those portions of the file which the judge determines to be relevant." That bothers me a little bit, because again it means their discretion.

Chief Barrett: Yes. That is discretion on the part of the bench. Do you want to expose the whole file? I don't think you should, personally. I would think you have to consider the kind of material that is in a personnel file. Are officers financial records germane on an assault case, for instance. I don't think so. They might be germane on a theft case. It would depend on the issue. I don't think you should be getting into people's personnel files unless you have really demonstrated a need to do so. I fall back on my argument before we got into specifics that was as a class of employees where does it say you abrogate your rights, the rights that you have, the rights that the guy who works for General Electric has, or the guy who works for the state highway department has. We should be entitled to the same rights. Granted, we do something a little differently, and that is why this is at least allowing some access if you have met a standard. But, if we didn't do that, I would say we have every constitutional right to keep that matter private. I can't go to my local school board and say I disagree with one of the teachers and I would like to see their personnel file because it is my understanding they whatever. They say "yeah, right." And that wouldn't happen. I wouldn't have access to it. Well I am not sure that we should be found in a different class or put in a different category, as law enforcement people. Again, I don't know that we should be expected to have abrogated our rights under the constitution by merely raising our hand and accepting the responsibility of our position.

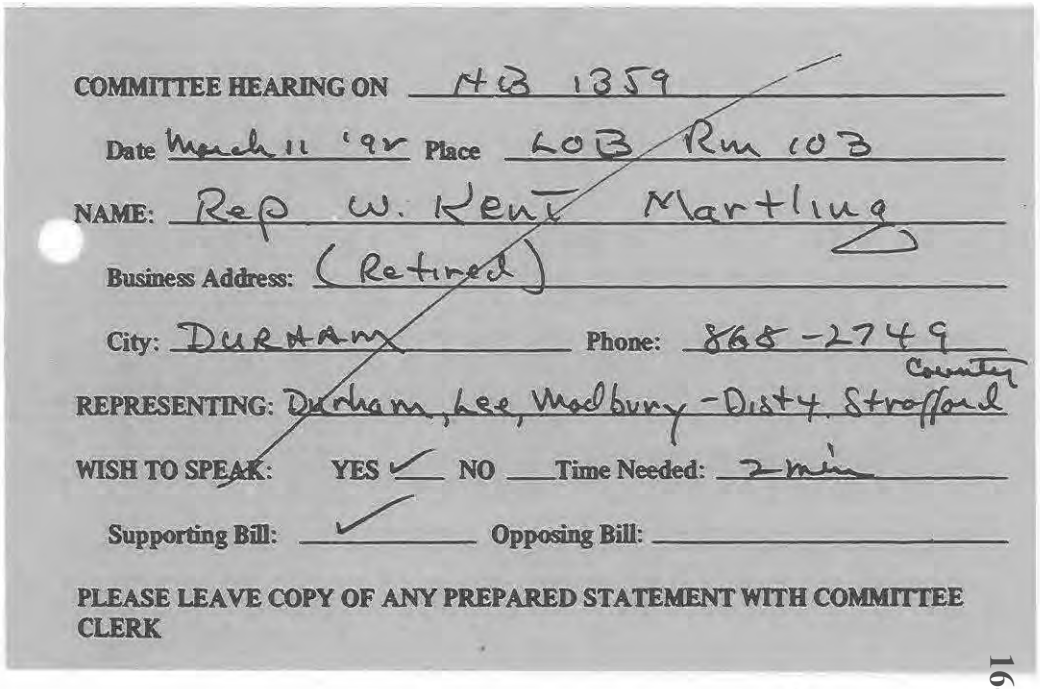
Rep. Kent Martling, Straf D 4: I am here for one reason I knew that Peter was going to be away but I understand he has written you letter, and as chairman of Judiciary in the House, I just wanted to report that we had a hearing that consisted of Nina Gardner, Chief Barrett, Ed Kelly - Administrative Judge of the Courts, Jim McGonigle, Claire Ebel - Civil Liberties Union, and even a person from the Union Leader. They all came in support of the bill. There was no opposition. Our civil subcommittee voted ought to pass with the amendment 5-0 and it came out of the committee 17 to 1. It was on the consent calendar. I would like to point out one thing which you might take up if this goes to subcommittee or however you work this. I looked this over last night, and in the original bill, before it was amended, it start out as new section "confidentiality of police personnel files" amend RSA 105 by inserting after section 13-A the following new section. That was 105:13-B. Then they had roman one, except as provided in paragraph 2, contents of any personnel file of a police officer shall be confidential and shall not be treated as a public record, pursuant to RSA 91:A. Then it went on and gave number 2, which was substantially the amendment. That was changed by a

sentence or two. Now, speaking to Chief Barrett and Jim McGonigle before the hearing this morning, there is a question that one word maybe was left out. So I would like to have this checked into. Otherwise, that takes care of my testimony and I will be happy to answer any questions.

Doug Patch; Assistant Commissioner, Department of Safety: I am here to appear in support of this bill. I won't reiterate what Chief Barrett has said, other than to say that I really think on behalf of the state police, the highway enforcement officers, the marine patrol officers, and our gaming enforcement officers who are all police officers who work for our department, I think this is a reasonable compromise. I think it provides some standards for a court to use. It may not be perfect, but I think it is a good step in the right direction. I agree with what the Chief said. There is a need to protect a police officer from an unreasonable intrusion into that individuals privacy. I think that is really what we are asking you to do here. At the same time, I think the bill is reasonable because it is providing a mechanism for a defendant to be able to get to know relevant information. So I think it is a good bill in its current form.

Nina Gardner; Judicial Council: The Judicial Council looked at this piece of legislation and voted to come in and support the legislation. As was testified earlier, the Judicial Council has looked at it. We had a unique perspective on the bill because the judges who are familiar with this problem and had seen it played out in court and some of the other members of the council were familiar with the issues. We felt that by establishing this standard that has been alluded to, and that is the probable cause standard, that there would be something that the judge would need to look at. The judges were concerned that the defense counsels, without a limit, can simply go on a fishing expedition. I think everybody has to know that the other part of my job involves defense council of the state. I discussed this with some of the attorneys in the public defenders office. Of course, they would prefer to see no standard and have that access unlimitedly to the issues that may be relevant for their client. However, they felt that this standard was an appropriate standard. It is a recognized standard and would give the judges something to look to. They also agree with what Chief Barrett said. You are going to have judges with varying degrees of discretion and varying interpretation of what that standard is. However, absent that, you do expose the whole issue to open exploration and that is what this attempts to deal with. I would be glad to answer any questions that you might have.

Hearing closed at 12:02



COMMITTEE HEARING ON HB 1359

Date March 11 '97 Place LOB Rm 103

NAME: Rep W. Kent Martling

Business Address: (Retired)

City: DURHAM Phone: 865-2749 Counties

REPRESENTING: Durham, Lee, Madbury - Dist 4. Strafford

WISH TO SPEAK: YES ✓ NO Time Needed: 2 min

Supporting Bill: ✓ Opposing Bill:

PLEASE LEAVE COPY OF ANY PREPARED STATEMENT WITH COMMITTEE CLERK

164

LEG042

Date March 11, 1992 Time 11:00 a.m.

SENATE JUDICIARY COMMITTEE

PUBLIC HEARING

ON

HB 1359: relative to the confidentiality of police personnel files in criminal cases.

APPEARING IN FAVOR (Please Print)

NAME	ADDRESS	REPRESENTING
Rep. Alice B. Record		Constituency - Dist. 23
CHIEF DAVID BARRETT	11 RIVER ST. JAFFREY	N.H. ASSOC. OF CHIEFS OF POLICE
DOUG PATCH	10 Hazen Dr.	D.O.S.
Jim McConigle Jr	21 LAKE ST Concord	NH Police Association Do not wish to speak
Nina Gardner	Rm 410 State House Annex	Judicial Council

APPEARING IN OPPOSITION: (Please Print)

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF COMMITTEE

DATE: March 26, 1992

THE COMMITTEE ON JUDICIARY

To which was referred House Bill 1359

AN ACT relative to confidentiality of police personnel files in criminal cases.

VOTE: 5-0

Having considered the same, report the same without amendment and recommend that the bill: **OUGHT TO PASS.**

Senator Hollingworth
For the Committee

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that is highly critical of the Salem Police Department. The audit was performed by a nationally recognized consulting firm retained by the Town of Salem's outside counsel at the Town's request. The audit looked at only two aspects of the police department's operations, i.e., its internal affairs investigative practices and its employee time and attendance practices. The audit report also includes an addendum that is critical of the culture within the police department and the role that senior police department managers have played in promoting that culture.

The Town has already released a redacted copy of the audit report to the public. The Town admits that the audit report is a governmental record that must be made available to the public in its entirety absent a specific statutory exemption. RSA 91-A:1-a,III; RSA 91-A:4,I and RSA 91-A:5. The Town argues that the redacted portions of the audit report fall within two such exemptions, namely those for "[r]ecords pertaining to internal personnel practices" and "personnel . . . and other files whose disclosure would

constitute invasion of privacy." RSA 91-A:5. The Town has not cited any other statutory exemptions.

The plaintiffs do not merely dispute the applicability of these exemptions, they also argue that the exemptions cannot be applied without violating their State constitutional right to access public records. N.H. Constitution, Part 1, Article 8. The Town disagrees, arguing that it honored its constitutional obligation by releasing the redacted report.

II. The Court's Review

The court reviewed the unredacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that—with a few glaring exceptions—the Town's redactions were limited to:

(A) names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings;

(B) names, dates and other identifying information relating to specific instances in which employees were paid for details they worked while they were also simultaneously paid for their shifts; and

(C) the name and specific instances in which a very senior police manager worked paid outside details during his regular working hours and purportedly, but without documentation, did so through the use of flex time rather than vacation or other leave time, contrary to Town policy.

III. Governing Law

To paraphrase the famous quote, you apply the law that you have, not the law you might want.[1] A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the "internal personnel practices" exemption forbids the court from making this balance and requires the court to uphold most of the Town's redactions in this section of the audit. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); see also Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006); Clay v. City of Dover, 169 N.H. 681 (2017).

The holdings in Fenniman, Hounsell and Clay, construing and applying the "internal personnel practices" exemption in RSA 91-A:5,IV, allow a municipality to keep police department internal affairs investigations out of the public eye. Indeed, Fenniman was grounded in part on legislative history suggesting that confidentiality (i.e. secrecy) would "encourage thorough investigation and discipline of dishonest or abusive police officers." Fenniman, 136 N.H. at 627.

Notwithstanding that sentiment, the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e. the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

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[1] "You go to war with the army you have, not the army you might want[.]," Donald Rumsfeld, December 8, 2004, (*Troops Put Rumsfeld In The Hot Seat*, available at www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) (severely criticizing, but conspicuously not overruling Fenniman and Hounsell). Consistent with this criticism, reasonable judges in other states have read nearly identical statutory language 180 degrees opposite from the way Fenniman construed RSA 91-A:5,IV. See, e.g., Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

However, this court is bound by the Fenniman line of cases and must, therefore, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations. That said, as recounted below, while the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with a good description of both the individual investigations that the auditors reviewed and the bases for the auditor's conclusions.

The Time and Attendance audit is a more classical "internal personnel practices" record. To be sure, the Time and Attendance section of the audit report reveals operational concerns and suggests remedial policies. However, the publicly available version of the audit report describes those concerns, provides the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy. Accordingly, the court must uphold most, but not all, of the Town's redactions in this section of the audit report.

With respect to plaintiff's constitutional argument concerning the "internal personnel practices" exemption, the New Hampshire Supreme Court has never suggested that the right of public access established by Part 1, Article 8 is any broader

than that established by the Legislature. See generally, Sumner v. New Hampshire Secretary of State, 168 N.H. 667, 669 (2016) (finding that a statutory exemption to Chapter 91-A for cast ballots is constitutional, and noting that such statutory exemptions are presumed to be constitutional and will not be held otherwise absent "a clear and substantial conflict" with the constitution).

With respect to plaintiff's constitutional argument concerning the "invasion of privacy" exemption, the court finds that the constitution requires no more than what the statute demands.

IV. Specific Rulings With Respect To The Internal Affairs Practices Section Of The Audit Report (i.e., Complaint Ex. A)

Arguably, the entire Internal Affairs Practices section of the audit report could be squeezed into the "internal personnel practices" exemption. However, because the Town released a redacted version of the report, the court looked at each specific redact in light of what has already been disclosed. The court then determined which redactions could be justified under the "internal personnel practices" exemption or the "invasion of privacy" exemption.

The court's rulings are set forth in page order. Although the terminology does not fit exactly, for the sake of clarity the court either "sustained" (i.e. approved) or "overruled" (i.e. disapproved) each redaction as follows:

A. The redactions on **page 7** are overruled. These redactions do not fall within either claimed exemption. The relevant paragraph describes a conversation between the Town director of recreation and a police supervisor. It was not part of an internal affairs investigation or disciplinary proceeding. The audit report does not even name

the supervisor. It just refers to him or her as "a supervisor." The Town apparently redacted the reference to "a supervisor" to avoid embarrassment: The gist of the passage was that a police supervisor condoned the use of force as form of street justice, contrary to both civil and criminal law. The supervisor told the auditor, "Well, if you are going to make us run, you are going to pay the price." The public has a right to know that a *supervisor* believes that it is appropriate for police officers to use force as a form of extra-judicial punishment.

B. The redactions on **page 36** are overruled. These redactions do not fall within either exception. They simply refer to the facts that (a) a lieutenant was caught drunk driving, (b) an officer left a rifle in a car and (c) there was an event at an ice center. There is no reference to any named individual or to anything specific about any investigation. In today's parlance, the discussion on page 36 is just too meta to fall within either exemption.

C. The redactions on **Page 38** are sustained because they fall within the "internal personnel practices" exemption. They reference the pseudonym of the involved officer and provide the date of the investigation.

D. With the exceptions set forth below, all of the redactions in **Section 5 (pp. 39-91)** are sustained because they fall within the "internal personnel practices" exemption. The audit report does not identify the subject of any internal affairs investigation. Instead it uses pseudonyms such as "Officer A," "Lieutenant B," "Supervisor C," etc. The Town redacted (a) the names of the internal affairs investigators, (b) the names of the individuals who assigned the investigators to each case, (c) in some cases the gender of one or more persons (i.e. the pronouns "he," "she," "his," "her" etc.), (d) the

dates of the alleged incidents of misconduct, (e) the dates of the investigations. All of this was done to protect the identity of the participants in specific internal affairs investigations. This is permissible. The Town also redacted a few locations, as well as other specific facts that might identify a participant. For example, the Town redacted the fact that one individual was a K9 handler, presumably because the Town had specific reasons for believing that information would unmask one or more of the participants. The court finds that this was permissible.

That said, a few of the redactions in Section 5 cannot withstand scrutiny, and are, therefore, overruled, i.e.

- **Page 46-47** was over-redacted. The supervisor should be identified as a supervisor. The employee should be identified as such. Doing so would not intrude upon their anonymity. To this extent the redactions are overruled.

-**Page 58** was over-redacted. It should be made clear that the individual did not take a photograph of the injury. The redaction changes the substantive meaning of the sentence. To this extent the redactions are overruled.

-The term "supervisor" on **page 66** should not have been redacted. The term "supervisor" was redacted from a sentence describing Kroll's (i.e. the outsider auditor's) "grave concern that a Salem PD **supervisor** expressed contempt towards complainants, ignored the policy requiring fair and thorough investigations and has an attitude that this department is not under any obligation to make efforts to prove or disprove complaints against his officers, especially one involving alleged physical abuse while in custody." Why should that "grave concern" not be shared with the public? This redaction is overruled.

-The reference to Red Roof Inn on **pages 67 and 72**, as a place that has seen its share of illicit activity, should not have been redacted. This reference does nothing to identity any participant in an investigation. Public disclosure of the reference might be deemed impolitic, but there is no exemption for impolitic opinions. This redaction is overruled.

-The entirety of **pages 75 through the top portion of page 89**, relating to a December 2, 2017 incident at a hockey rink was already made public. Those pages were originally heavily redacted. However, the unredacted pages were provided to a criminal defendant as discovery and the Town responded by making those pages public.

E. The redactions on **pages 93-94** are sustained because they fall within the "invasion of privacy exemption." These redactions do not relate to an internal affairs investigation. Essentially, a police supervisor spoke gruffly to his daughter's would-be prom date because he disapproved of him as a prospective boyfriend. The supervisor's comments did not relate or refer to his position. The supervisor's comments had nothing to do with the Salem Police Department. The prom date's mother was dissuaded from filing a formal complaint over the gruff comments. The redactions protect the privacy of the supervisor's (presumably) teenage daughter and her young friend. The public interest in the redacted passages is minimal, and is made even more minimal by the fact that most of the audit report has been made public already.

F. The redactions on **Page 99** are overruled. An individual contacted Kroll to explain that he spoke with Deputy Chief Morin and Chief Dolan about a complaint that he had. The individual was pleased with Morin's and Dolan's professionalism. He

decided not to file a complaint. The Town redacted Moran's and Dolan's names and ranks. These redactions do not relate to an internal affairs investigation because there was none. The redactions do not further any privacy interest.

G. The redactions on **page 100** are overruled because they do not fall within either exemption. The redactions do not relate to an internal affairs investigation. Rather, a resident contacted Kroll to complain that the Salem PD allegedly failed to enforce a restraining order. The phrase "restraining order" was redacted, for no apparent reason. No individual officer is identified, even by pseudonym.

H. The redactions on **page 101**, **item 6** are overruled because they do not fall within either exemption. Kroll was contacted by somebody who opined that complaints against supervisors were not taken seriously. No specific complaint or supervisor was discussed. The Town redacted the fact that the person who contacted Kroll was a former member of the Salem PD. The redaction serves no purpose and does not fall within either of the claimed exemptions.

I. The redactions on **page 101, item 7** are overruled. Kroll was contacted by a person who claimed that the Salem PD arrested a family member without probable cause. The Town redacted the portion of the passage that states the family member believed that the alleged victim in the case had a relationship with a supervisor. There was no internal affairs investigation. No individual is mentioned by name. The redaction does not fall within either of the claimed exceptions.

J. The redactions on **page 101-106, Item 8** are overruled. The redactions relate to statements that a town resident made to Kroll. These are not "internal personnel

practices" and there is no "invasion of privacy." An investigation was performed by the Attorney General's office, but this was an *"internal* personnel practice." See Reid.

K. The redactions on **pages 107 and 108** are all overruled because they do not fall within either claimed exemption. The Town redacted the names of individuals who called Kroll. These calls were not part of an "internal personnel practice." The callers did not ask for anonymity. They were coming forward. There is no invasion of privacy. Additionally, the redacted reference to the Red Roof Inn has nothing to do with personnel practices or personal privacy.

L. The redaction on **Page 109** is sustained. The pertinent paragraph refers to an internal affairs investigation described at pages 40-41. The same information is the subject of an earlier redaction.

M. The redactions on **Page 110** are overruled. They do not fall within either claimed exemption. The redactions related to Deputy Chief Morin's dual roles as (a) a senior manager and (b) a union president responsible.

N. The redactions on **Page 118, first full paragraph** are overruled. They do not relate to an internal affairs investigation or any other sort of personnel practice.

O. The redactions on **Page 118-119**, carryover paragraph are sustained. These relate to an individual employee's scheduling of outside details and time off. Those are classic "internal personnel practices" concerns. Although there is no indication as to whether the same facts are reflected in a formal personnel file, the audit report is itself an investigation into internal personnel practices. Therefore, under Fenniman, the court cannot engage in a balancing analysis but must instead sustain the redaction.

V. Specific Rulings With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "*Culture Within The Salem Police Department*")

A. The redactions on the **first two sentences of the third paragraph on Page 1**[2] of the Addendum are overruled. Essentially, the redacted material explains that it was the Chief who took "an extended absence" and "the rest of the week off. This is just a fact, not an "internal personnel practice," or a matter of personal privacy.

B. The remaining redactions in the **third paragraph on Page 1** of the addendum are sustained. Those redactions relate to the manner in which an employee arranged to take vacation leave and other time off from work. This is a classic internal personnel matter.

C. The redactions on the **carryover paragraph on Pages 1 – 2** are sustained for the same reason.

D. The **remainder of the redactions on Page 2** (i.e. those below the carryover paragraph) are overruled. Those redactions relate to operational concerns rather than "internal personnel practices." To be sure, the Chief is identified by name as being personally responsible for the Police Department's lack of cooperation with the Town Manager and Board of Selectmen. However, this was a Departmental policy or practice and the Chief was necessarily essential to the implementation of this policy or practice. The redactions do not fall within either of the claimed exemptions.

E. The redactions on **Page 4** are overruled. The redacted passages relate to comments made by Deputy Chief Morin concerning (a) his opinion of the Town

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[2]The original document was not paginated. **The page numbers refers to the Bates stamped numbers at the bottom of each page of Exhibit B to the Complaint (i.e. the redacted, publicly available document).**

Manager's credibility and (b) his thoughts as to why the outside auditor was hired. Morin makes reference to a citizen's complaint that the Town Manager referred to the Police Department. However, there is no reference to (a) the substance or nature of the complaint, (b) the year or month of the complaint, or (c) any subsequent investigation. There is no reference to an internal affairs investigation or any personnel proceeding. The redactions indicate that (a) Morin was a subject of the complaint and (b) the complaining party was female. The fact that a citizen made a complaint to the Town Manager is not, in and of itself, an "internal personnel practice." The redactions are not necessary to prevent an invasion of personal privacy.

F. The redactions on **Pages 5** are overruled. The Town redacted the outside auditor's opinions regarding statements that Deputy Chief Morin made on Facebook about the Town Manager. Those statements were disclosed in the publicly available, redacted copy of the report. The only thing that was kept from the public was the characterization of the statements by the auditors. Thus, the redactions do not relate to facts or to any sort of investigation, proceeding or personnel practice. Further, because Morin placed his comments on Facebook, (albeit in a closed group for Town residents), the auditor's opinions about those comments is not an invasion of Morin's personal privacy.

G. The redaction on **Page 6, on the carryover paragraph from Page 5,** is overruled. This redaction relates to post-hoc opinions that "human resources" gave to the auditors relating to Morin's statements on Facebook. However, there was no "internal personnel practice" or proceeding that flowed from Morin's statements. The

Town does not argue that any such practice or proceeding may be forthcoming. The made-for-the-audit opinion does not fall within either of the claimed exemptions.

H. The balance of the redactions on **Page 6** are overruled. Most of these redactions relate to comments about the workplace culture instilled by the Chief and Deputy Chief. Thus, they relate to operational issues, i.e. to the manner in which the department is operated and to the top executives' management style. To be sure, the comments are highly critical of the Chief and Deputy Chief, but not every alleged misstep or every problematic approach to managing a police department is an "internal personnel practice." The line between an operational critique and an "internal personnel practice" is sometimes blurry. In this case, there is no suggestion of a pending, impending or probable internal affairs investigation, disciplinary proceeding or informal rebuke. The information in the auditor's report does not come from a personnel file or from any document that should be in a personnel file. The court finds that the redactions do not fit within either of the claimed exemptions.

The other redactions on **Page 6** relate to the month and year that (a) an unidentified officer was cited for DUI and (b) an unidentified second officer left the scene of an accident without an alcohol concentration test. These facts are not "internal personnel practices." The officer's identities are not disclosed. The redactions do not fall within either claimed exemption and, therefore, they are overruled.

I. The redactions on **the first full paragraph of Page 7** are sustained. These redactions relate to "internal personnel practices." The redactions protect the identity of the participants in the investigation (i.e. the subject and the investigator).

J. The redactions in the **quoted remarks of Chief Donovan on Page 7** are sustained for the same reason. The redactions protect the identity of the witnesses in the internal affairs investigation.

K. The redactions on **the balance of Page 7 and on Pages 8-12** are sustained in part and overruled in part. These redactions relate to two internal affairs investigations involving the same police department employee. However, instead of simply redacting the names of the participants, the Town redacted six pages of facts and analysis. This is a marked departure from how the Town redacted virtually all of the other discussions of internal affairs matters. The court finds that:

1. The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp.10 and 11. Those individual's names were properly redacted.

2. The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted.

3. The tension between the Police Chief and the Town concerning the reporting of these matters to the Town authorities is an operational concern, not an "internal personnel practice."

4. The Chief's comments about the matters need not be redacted, except that the references to (a) the individual who was the subject of the investigation, (b) the witness in the investigation and (c) the dates of occurrences may be redacted.

VI. Specific Rulings With Respect To The Time And Attendance Section Of The Audit Report (Complaint Ex. B)

The redacted, publicly available version of the Time and Attendance section of the audit report indicates that a number of police employees (including twelve out of fifteen high ranking officers) were paid for outside details during hours for which they were also receiving their regular pay. To be fair, the audit report does not suggest chicanery or ill-motive. Apparently, the companies that paid for the details would pay for a set number of hours even when the details lasted for a shorter duration and even when the officers returned to work thereafter.

The publicly available version of the audit report also indicates that a very high ranking employee acted contrary to Town policy by working details during business hours and then making up the hours with flex time, rather than leave time.

The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record relating to "internal personnel practices." Nonetheless, the Town has made the bulk of this document public. The redactions in the publicly available report serve mainly to shield the identity of the affected employees.

A. Except to the limited extend described below, all of the redactions of employee names are sustained under the "internal personnel practices" exemption.

B. The dates of the outside work details and the identities of the outside parties that contracted for the details were unnecessarily redacted. Nobody could determine the identity of the affected employees from this information. Therefore, in light of what has already been released to the public, these redactions cannot be justified under

either of the claimed exemptions. The redactions of dates and outside contracting parties are overruled.

C. The court reluctantly sustains the redactions to the interviews of police department employees. These were investigative interviews that focused not only on operational issues but also on potential personnel infractions by the interviewees.

D. The court sustains the redactions to the interview of the former Town Manager for the same reason.

E. The reference to "higher-ranking" officers on **Page 15** of the report is overruled because the same information already appears elsewhere in the publicly available report.

F. The court overrules the redactions on **the last paragraph of Page 40** (relating to a finding with respect to the SPD detail assignment program). This paragraph discusses an operational concern and does not relate to any particular employee's alleged conduct. Therefore, these redactions do not fall within either of the claimed exemptions.

G. The court overrules the redactions on **Page 42.** The redactions do not apply to any specific individual. The issue was presented as an operational concern going forward rather than a personnel matter. The redactions do not fall within either of the claimed exemptions.

VII. Order

Within 21 days, the Town shall provide the plaintiff's with a copy of the audit report that contains only those redactions that have been sustained by this court. The

court will stay this order pending the filing of a notice of appeal upon motion by the Town.

April 5, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/05/2019

Cops who received Floyd text want their names kept secret

- By Mark Hayward Union Leader Staff
- Sep 9, 2022 Updated Oct 6, 2022

This screenshot image was part of the Manchester Police Department internal affairs investigation of the police officer who texted it to fellow officers.
PROVIDED BY MANCHESTER POLICE

Several Manchester police officers and sergeants have gone to court in an attempt to block their public identification in a lengthy internal affairs report into the distribution of a meme that mocks murder victim George Floyd.

The officer who texted the meme, Christian Horn, already has been identified.

Two weeks ago, Manchester police complied with a public records request filed by the New Hampshire Union Leader and released an image of the meme — Floyd's face beside the words "You Take My Breath Away" and beneath the caption "Black Love."

The department also released the internal affairs investigation into the text but redacted the names of 10 officers, including four sergeants, who received the text. In doing so, they pointed to a civil court action filed by the officers just days before the document was to be released.

The officers and sergeants asked a judge to block their identification.

Their filing raises an issue of what police officers, or anyone, should do when confronted with potentially racist or hateful messages.

Horn sent the meme, which included a pink background and hearts, out in two separate threads on Feb. 10, 2021, four days before Valentine's Day and about nine months after Floyd's murder by Minneapolis police.

Police officers in **Los Angeles have faced a severe backlash** for transmitting a nearly identical meme.

The names of the officers also are redacted in the Manchester lawsuit. According to the suit, they received the text on their personal phones while they were off-duty. None responded to the text or forwarded it, according to the suit. All were exonerated of any wrongdoing.

MANCHESTER POLICE DEPARTMENT
PROFESSIONAL STANDARDS
REPORT OF INTERNAL INVESTIGATION
File # 21-IA-02

COMPLAINANT: [redacted]

ABSTRACT OF ALLEGATION:

Using his personal cell phone, while on-duty, Detective Christian Horn sent a meme via text message, depicting George Floyd on a mock Valentine's Day card, with the words "You take my breath away." The meme also depicts hearts and "To:" and "From:" notations. The words "Black Love" are shown above the picture of Mr. Floyd. This was sent on two separate text threads, only seconds apart, to other Manchester Police Department personnel, including supervisors (Sergeants [redacted] and [redacted] One of these text threads contained [redacted], who was offended by the meme and found it highly inappropriate. [redacted] was not only offended by the meme itself, but by the apparent lack of outrage and condemnation by the other recipients in the text thread.

APPLICABLE RULES:

MPD SOP Professional Conduct Section III-Procedure, Paragraph A-Harassment

MPD SOP Rules and Regulations Section VIII-Required Conduct, Paragraph V-Conduct

MPD SOP Rules and Regulations Section VIII-Required Conduct, Paragraph W-Civility

MPD SOP Rules and Regulations Section IX-Prohibited Conduct, Paragraph B-Conduct Unbecoming an Officer/Employee

“While the public may very well have the right to know the details of Horn’s infractions, if any, and how those infractions might affect his position as a police officer, that does not apply to the (officers) who had no involvement other than having received the text and who were exonerated as having NO other involvement,” reads the filing by North Hampton lawyer Joseph McKittrick.

The suit, filed against the Manchester Police Department, asks a judge to block the department’s release of the names. It’s unknown whether the department and the city will contest the filing.

City: No comment

Mayor Joyce Craig would not comment, a spokeswoman said. City Solicitor Emily Rice also would not comment.

The ACLU-New Hampshire, which filed a Right to Know request for the Horn investigation, said it favors release of the names, especially the supervisors who received the text.

“Once again, New Hampshire police officers are going to court to keep secret important and complete investigatory reports of which they are a part — a tactic that stands in direct opposition to the public’s right to know,” ACLU Legal Director Gilles Bissonnette said in a statement.

He noted that two supervisors saw this racist meme and did nothing.

“These supervisors were content to be associated with Christian Horn privately, but now want to keep this association secret,” he said.

The officer who complained about the Horn text “seemed most bothered by his perception that none of the other recipients of the meme reacted to it, or called it out as inappropriate,” Detective Jeffrey Fierimonte told internal affairs investigators.

Fierimonte and one other officer, Eric Joyal, are the only rank-and-file officers, besides Horn, whose names appear in the investigation documents as receiving the meme.

The investigation determined that supervisors considered the meme in poor taste but not racially motivated. The investigation concluded that there was no need to address a bad joke.

The report of the investigation said that dark humor and morbid jokes are a coping mechanism in police work.

“It is frightening to contemplate the potential impact to the mental health of police officers, if they were to be subjected to a standard that forbade them from ever indulging in morbid humor,” the investigation’s report reads.

Recipients in same division

Nearly all officers who received the Horn text were members of the Special Enforcement Division, a street-level division that attacks problems such as drugs, prostitution and illegal gambling, with a focus on high-crime neighborhoods.

Two officers from the division were fired in 2018. Darren Murphy was fired for reasons that never fully came to light. Aaron Brown was fired after joking about shooting Blacks in a text to his wife.

The officer who complained about Horn said he did not believe he would get any support going up the chain of command in the Special Enforcement Division. So he complained to Capt. Brandon Murphy, who at the time was captain of the patrol division, according to the Horn investigation.

The investigation does not identify the officer who complained or give his race. But based on material contained in the investigation, indications are that he is one of the few African Americans in the department.

Black Lives Matter Manchester has said the officer who complained about the text was Black.

Horn was suspended for three days, forced to take an online sensitivity course and moved from the Special Enforcement Division to patrol. Last month, he was promoted to sergeant.

Police Chief Allen Aldenberg has said Horn is not a racist, and the text was insensitive but not racist.

Both the Manchester NAACP and Black Lives Matter have said that the meme and the response raise questions about the department's culture.

mhayward@unionleader.com

Fired cop Aaron Brown: I might be prejudiced, but not racist

- By Mark Hayward New Hampshire Union Leader
- Oct 27, 2020 Updated Oct 28, 2020

Manchester city government has been in a standoff with the Manchester Police Patrolman's Association union and fired officer Aaron Brown.
DAVID LANE/UNION LEADER

Interview excerpts

Below are excerpts of a Manchester Police Department internal affairs interview with Aaron Brown on March 16, 2018, about a month before he was fired.

The interview was conducted by Sgt. Timothy Patterson and Sgt. Shawn McCabe, who later recommended Brown's termination.

Much of the interview focused on a May 2017 text exchange between Brown and his wife, when he was working on a joint drug case with the FBI in Dorchester, Mass. He wrote in two texts: "I got this new fancy gun. Take out parking tickets no problem. FYI 'Parking tickets' = black fella."

The following transcript is contained in Brown's arbitration proceedings:

Patterson: You're calling them a parking ticket. It's a very derogatory term, wouldn't you agree?

Brown: It's derogatory, sure.

Patterson: And that's what you're using as a Black person. So, you're using a derogatory term to describe Black people and talking about using lethal force on Black people?

Brown: If it occurred, yeah, absolutely. But that's my point to her (his wife).

Patterson: Having been to Dorchester, right? It's not a hundred percent Black. So, why would you just say "I got this new fancy gun" and "take out parking tickets no problem." Why not "Don't worry, honey, I'll be able to protect myself." "Don't worry honey, we've got this. All the guys here are good." "Don't worry honey, we're all set." You specifically use the phrase "parking ticket no problem." And that it's a "black fella." Somebody on the outside looks at this and reviews this and says "Hmm, that looks like racial profiling to me." This is the definition of racial profiling, talking about a specific race and singling out that specific race. Correct?

Brown: I suppose.

McCabe: It's a yes or no question.

Patterson: So now you're racially profiling? That's what you're telling me?

Brown: No. I don't racially profile people ... The targets that we were dealing with were African-American people.... Given our course of conduct we were going to be doing there, that was essentially who we were going to be dealing with....

Patterson: So you use that term "parking ticket" in a negative connotation. True?

Brown: Correct.

Patterson: About Black people. So you do have prejudice leanings?

Brown: Yes. That's what I said, "prejudiced."

Patterson: OK. And there's another one where you mention — talking about parking tickets again. This is on the 22nd of August of 8:40 in the evening. Your wife says, "What are you doing at work tonight?" You say, "The usual. Currently putting the stalk on a parking ticket, like the big jungle cat that I am." ... So, it appears to us, in reading this, that you have a problem with Black people.

Brown: I wouldn't say I have a problem with Black people.

Patterson: You don't?

Brown: No, not in the least.

Patterson: You just call them parking tickets, because why?

Brown: I don't really know. It's just a term that I've heard used before.

Patterson: Where have you heard that?

Brown: In and amongst other law enforcement realms.

Patterson: OK. Not that I would have, but I've been in law enforcement for 20 years and I've never heard that....

Patterson: So can you explain this then? All right, so this is Oct. 2nd in the evening. This is your wife: "Just heard (REDACTED) make (REDACTED) pinkie promise to call a female dog a female dog and not a bitch. I'm guessing we can thank (REDACTED) for that one too." (Brown reply): "Yup, I suspect that's the case. Little s---face. Should go down there and slap the black off him." What does that refer to?

Brown: Hmmm?

Patterson: "Slap the black off him," means to straighten him out?

Brown: Well, yeah, he's causing problems with my kids.

McCabe: ... How do you explain the "black"? Where's the black come into play? What does that refer to if he's White?

Brown: He is. Yeah, he's — he is White. His dad's White. His mom is — She's not Black. I don't know if she's like Spanish or something, but definitely not Black.

McCabe: So he is mixed race?

Brown: He might — Yeah, he could be. Could be mixed race.

McCabe: So what does the term "slap the black off of him" mean, then? If you're saying he's not Black, why do you — where's the Black come into play?

Brown: I don't know. I don't know why I would write "slap the Black off of him."

Patterson: But you did. It's right here.

Brown: Yeah, it's written there, but I'm trying to think what else I would have been saying, like the bag off him or "slap" something — I don't know — I don't know why I would put "black" talking about him....

Patterson: But taken in context with the rest of these, do you see why we have a concern with this?

Brown: Oh, absolutely. Absolutely.

Patterson: That it appears that you have some definite racist, prejudicial leanings, and that we have concerns with that?

Brown: Sure.

Patterson: OK. And the fact that, you know— do you feel that this is proper or — or good for somebody that's working in your position, in our field, to have this kind of --

Brown: Well, I guess, what — what my point of view is: We're all allowed to have our views on things. Now I don't go out and specifically target, you know, people of minority, and I think all my activity would supposed that, if you look at all of your arrests --

Patterson: OK. So if we did a run on all of your arrests --

Brown: Absolutely.

Patterson: — we wouldn't find a high proportion of minority arrests --

Brown: No.

Patterson — or dealings with --

Brown: Not even close.

Paterson — or assaults or --

Brown: Nope.

Patterson — anything of that nature?

Brown: Not in the least.

Patterson: So, you don't think that you've allowed, you know — obviously what your personal feelings are — you haven't allowed that to affect your job performance --

Brown: No not in the least.

Patterson: — in any way shape or form?

Brown: Absolutely.

A pdf of documents related to Aaron Brown's employment as a Manchester police officer as provided by city solicitor Emily Rice.

Despite admitting to making derogatory comments about African Americans, fired Manchester police officer Aaron Brown insisted to internal affairs investigators he is not a racist, according to almost 600 pages of personnel documents released by the city.

Brown called Black men "parking tickets," saying he heard others in law enforcement use the term, according to the files. He admitted to making comments that referenced insulting stereotypes, such as African Americans liking fried chicken. And he texted his wife that he should "slap the black off" a mixed-race neighborhood kid bothering his children.

"(I) might be prejudiced but definitely not racist," Brown told investigators in a March 2018 interview. "I think I like to either mock or make fun of the stereotypical norms for other races."

The files also show that under an arbitrator's award, Brown continues to accumulate pay of $1,540 for every week that the city refuses to rehire him.

His back pay and benefits amount to about $139,600 so far, based on amounts outlined in the document.

The documents released Monday amount to 597 pages in PDF format.

The files were released in response to Right-to-Know requests by the New Hampshire Union Leader and the ACLU-New Hampshire for information about Brown's termination. Some pages are heavily redacted and others are completely redacted.

The city is in a standoff with the Manchester Police Patrolman's Association union and Brown.

Brown, a 13-year MPD veteran, was fired in April 2018 but later ordered returned to his job by an arbitrator who has determined that racist comments he sent to his wife on a department-issued cellphone were not sufficient to justify his termination.

The city has refused to rehire Brown. A telephone message left with one of his lawyers, Mark Morrissette of Manchester, was not returned Tuesday.

A leader in Black Lives Matter-Manchester said heavy redactions to the file paint an incomplete picture. But Ronelle Tshiela, co-founder of BLM-Manchester, said the file shows that substantial reforms are needed, and police unions are an obstacle to holding problem cops accountable.

"It's hard for us to think about how we can repair relationships with the police force when things like this are allowed to happen," said Tshiela, a member of Gov. Chris Sununu's commission on police accountability.

"It's discouraging, it's extremely disappointing, and it's disgusting we even have to talk about it," she said.

Files first to be released

The release of portions of the Brown file is the first following a New Hampshire Supreme Court ruling earlier this year overturning a long-standing precedent that public employee personnel files were exempt from disclosure.

Manchester City Solicitor Emily Rice said Monday's document release was limited to the arbitration rulings and filings.

Rice's office spent weeks with Brown's lawyers determining what portions of the file should be public and what should be redacted. For example, former Police Chief Nick Willard cited eight reasons for firing Brown in an April 11, 2018, termination letter. Only two of those were not blacked out.

Stipulation 7 stated that Brown joked about shooting Blacks, whom he called "parking tickets," in a text to his wife.

Stipulation 8 quoted another Brown text to his wife — that he was stalking a "parking ticket ... like the big jungle cat that I am."

During his interview with an internal affairs investigator, Brown said he didn't know the significance of the term "parking tickets" for Blacks. But he said he heard it used "in and amongst other law enforcement realms."

Brown was working on a joint drug investigation with the FBI in Dorchester, Mass., when he used the term in texts with his wife.

Meanwhile, portions of the file favorable to Brown were only lightly redacted. For example, his two officer-of-the-month citations and 11 generally positive employee performance reviews were nearly untouched.

"Detective Brown has not only proven to be highly effective in affecting arrests but has also cultivated several confidential sources of information due to his ability to

communicate and establish a rapport with individuals who possess valuable information," read a 2017 review.

It also noted that he had been exonerated of wrongdoing that year. Those details were redacted.

Critical info redacted

Also redacted was previous information that has been public. For example, files that the Union Leader has obtained from an outside prosecutor and a state labor board say Brown also was fired for intentionally damaging property during warrant-authorized searches.

Brown also was one of two officers accused of coercing a Manchester woman into sex. The city has paid $45,000 to settle the claims. Information about both those incidents was redacted.

The file also contains heavily redacted interviews with eight of Brown's coworkers. All said they were unaware of the term "parking tickets" as a reference to Black men.

Two said Brown used the term "Negro" to refer to Blacks on occasion.

"He'd say stuff jokingly regarding black people in that he would refer to them as Negros," another officer said. One detective said Brown was usually in a good mood when he entered the room. "He would walk in and say 'What's up my n-----s or 'What's up homeys.'"

The detective believed the remarks were a joke and not racially motivated.

An arbitrator consistently has ruled that Brown did not deserve to be fired for the text messages he exchanged with his wife and should only be suspended for 30 days without pay.

Two former police chiefs — Willard and Carlo Capano — and Mayor Joyce Craig have said Brown has no business being a police officer. In a recent letter to state officials who certify police officers, his lawyer — John Krupski — has said the city illegally fired Brown.

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Dover cop decertified after dishonesty about deadly chase

- By Josie Albertson-Grove New Hampshire Union Leader
- Jan 27, 2022 Updated Feb 3, 2022

A former Dover police officer permanently lost his police certification this week, in the wake of his dishonesty about a deadly chase he initiated, which ended in the deaths of two men.

Former officer Killian Kondrup was stripped of his police certification during a Tuesday session of the Police Standards and Training Council.

His case revolved around the allegation that he was not truthful during an internal investigation about a car chase he initiated in 2021 that ended with two men dead.

Kondrup, hired in Dover in 2018, has since been fired from the department and was working as a police officer in Lee until last week.

Lee Police Chief Thomas Dronsfield said Kondrup started in Lee in July 2021, and was not allowed to work alone, because he had been set to appear before the Police Standards and Training Council.

“We are handling it as we should and accordingly,” Dronsfield said in an email Thursday.

Dover Police Chief William Breault said Friday that Kondrup was fired for improperly documenting his attempt to stop the car, and for being untruthful about those documentation violations.

"I and the entire Dover Police Department hold ourselves to the highest of professional standards which includes zero tolerance for any lack of integrity," Breault said in an email. "The firing of Officer Kondrup highlights that fact."

Police Standards and Training Council sessions were only opened to the public last year, after the Union Leader filed a lawsuit for access to the decertification hearing for a Manchester police

officer. The Union Leader had reported that the police disciplinary hearings were the only professional license disciplinary hearings that were not open to the public.

The opening of the hearings came after the Legislature passed a law over the summer to reveal names on the so-called “Laurie List,” the Exculpatory Evidence Schedule of police with credibility problems. Dozens of names were released to the public for the first time in late December.

Kondrup’s name was among 10 names released in one version of the list when it was released on Dec. 29, according to a report by **InDepthNH.org**, then blacked out again later that same day as the Attorney General’s Office was made aware of other lawsuits filed by officers who wanted their names taken off the list.

On March 18, 2021, Joseph Bougie, 32, and Michael Murphy, 22, were on Sixth Street in Dover when Bougie crashed his BMW sedan into a utility pole near the intersection with Long Hill Road. The car caught fire, and Murphy was thrown from the car.

Both Murphy and Bougie were declared dead at the scene.

Friends of the men raised questions about the police version of events. The department said police had chased Bougie’s car, trying to arrest him on outstanding warrants, but police said they had given up the chase before the crash.

Ashley Green, of Dover, who had been in a romantic relationship with Murphy, told the Union Leader in March 2021 that the police description of events did not add up. Murphy had been texting her before he died, she said, saying police had been chasing Bougie’s car.

“Timewise and then location, it makes no sense,” Green said last year. “There’s still something missing and they’re not saying it.”

This article has been updated with Breault's statements, and the reasons for Kondrup's firing clarified.

MORE INFORMATION

Seven police officers arrested in 2021; 36 had certification issues

Court releases 2012 internal affairs review of Salem Police sergeant

- By Ryan Lessard Union Leader Correspondent
- Aug 11, 2021

The American Civil Liberties Union of New Hampshire is celebrating its fourth legal victory in unveiling examples of police “misconduct” contained within internal personnel documents after a Rockingham County Superior Court judge ordered the release of a 2012 internal investigation into Salem Police Sgt. Michael Verrocchi.

Judge Daniel St. Hilaire granted the release of the internal affairs documents on July 16. Town Manager Chris Dillon said the town decided not to appeal the order, and the police department sent the ACLU the documents on Aug. 3.

“This decision is an important one for police transparency in New Hampshire. “Since last year’s New Hampshire Supreme Court decisions making clear that the government cannot categorically keep police misconduct information secret, this is the fourth Superior Court decision that we are aware of ordering the disclosure of this information,” said ACLU-NH Legal Director Gilles Bissonnette in an emailed statement.

“These courts are saying what is obvious to the citizens of the Granite State, especially after the murder of George Floyd last year – namely, that there is a public interest in knowing about police misconduct. We will continue litigating these cases until this information becomes public once and for all.”

The nine-year-old incident, in which Verrocchi while off duty evaded fellow officers in a high speed chase down Route 28 in Salem, was never reported to prosecuting jurisdictions. Verrocchi was disciplined with a one-day unpaid suspension. The details of that incident later came to light after a 2018 audit of the Salem Police Department’s internal affairs process by Kroll Inc.

Last year, the state charged Verrocchi with felony reckless conduct with a deadly weapon and a misdemeanor count of disobeying an officer. In a plea deal announced last month, Verrocchi pleaded guilty to a speeding violation and will complete 100 hours of community service.

The investigation by Salem police leadership included interviews with Verrocchi and passengers who were in the vehicle at the time. Everyone involved believed Verrocchi was attempting a prank that went too far.

“He acted like it was a big joke,” Officer Michael White, who arrived at the end of the chase to back up his fellow officers, told investigators.

Verrocchi admitted his mistake.

“I messed up, it’s all on me, I took it too far,” Verrocchi said according to the documents.

Many of the other details of the incident were already made public in Verrocchi’s recently unsealed arrest warrant, which includes state investigator Todd Flanagan’s summary of the IA documents.

In a letter from former Deputy Chief Shawn Patten to Verrocchi, Patten said he expected this behavior not to occur again and applauded Verrocchi’s decision to take full responsibility for his actions that evening.

“You are well liked by your peers and supervisors and are an extremely intelligent and competent Police Officer,” Patten wrote.

ldnews@unionleader.com

Lebanon police lieutenant charged with stalking ex-girlfriend

Richard Smolenski (Grafton County Sheriff's Department photograph)

By ANNA MERRIMAN
Valley News Staff Writer
Published: 5/7/2021 2:40:52 PM
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LEBANON — A city police lieutenant has been charged with using fictitious online accounts to stalk a former girlfriend and threaten to release details about their sexual encounters, according to court documents.

Richard Smolenski, 43, of Bridgewater, N.H., pleaded not guilty to one misdemeanor count of stalking in Lebanon District Court on Thursday. He was released on his own recognizance and ordered not to come within 300 feet of his former girlfriend, Nicole Cremo, according to a bail order.

Following his arrest, Smolenski, who has been on paid administrative leave in July 2020, was placed on leave without pay on Thursday but technically is still employed with the police department.

Lebanon Police Chief Phil Roberts declined to comment on the pending criminal case against Smolenski or on his personnel status.

The charges stem from a series of emails and Snapchats — social media messages — sent from different accounts to Cremo in May 2020, at least two of which police

believe are linked to Smolenski, according to an affidavit written by Lt. Frederic James of the Grafton County Sheriff's Department, which investigated the case.

Cremo, who is the community corrections lieutenant for the Grafton County Department of Corrections, went to the sheriff's department on May 14, to make a report about the emails and messages, explaining that she and Smolenski, who is married, had an off-and-on relationship between 2017 and 2020.

She told investigators that the two frequently communicated via social media, including Facebook, Instagram and Snapchat.

She told investigators that in March 2020, Smolenski sent her a message saying his wife had found a photo of her on his personal email and was asking about it. Cremo replied that she had never emailed Smolenski a photo and didn't know how it got on his personal account, the affidavit said.

The emails between Smolenski and Cremo "show tension building between March and May 2020," the affidavit said.

The first threatening emails came on May 13 from an account with the name "James Brennan," who purported to be with the Bern Initiative and Madfish Corp., telling her to check her social media accounts, according to the affidavit.

Minutes later, on Snapchat, someone using the name Paul G wrote to Cremo saying, "If I was you, I would send an email apologizing for my poor decisions ... and that I know I shouldn't have made up a story," the affidavit said.

The user then forwarded an explicit audio file of a woman's voice.

Cremo didn't respond to the final message and, an hour later, received an email from the Brennan account again threatening to release documents, images and video files, according to the affidavit.

The email also included a message addressed to Cremo's current partner that contained explicit information about Cremo's relationship with Smolenski, according to the affidavit.

When she didn't respond, Cremo received another Snapchat message, this time from a user named "Mike James," claiming she had "30 minutes to send my friend an email," the affidavit said.

Three hours later she received a similar Snapchat from another user named "Martin Franklin" and the following morning she received another email from the Brennan account with more explicit details about her relationship with Smolenski and threats to contact her current boyfriend, the affidavit said.

It appears that Cremo suspected Smolenski was behind at least some of the messages as she was receiving them. In response to one message from the Mike James account, she wrote: “revenge porn is a felony, Rich.”

On the afternoon of May 14, Cremo wrote a message to Smolenski, apologizing and received an email from the Brennan account saying the information will “no longer be released,” according to the affidavit.

She received a final message that night on Snapchat from an account called “James Taylor,” writing, “If you start a fire, prepare to get burned,” the affidavit said.

Cremo told police the emails “terrified her” and she was worried that the information would be released. She was also worried about her “physical safety, not knowing what Smolenski was capable of based on his training and experience,” the affidavit said.

Smolenski has a military background and was the tactical team commander for the Lebanon department, according to the affidavit.

James, the Grafton County Sheriff’s investigator, wrote that the messages from Franklin and from Taylor both came from Smolenski’s residence.

The Paul G account appears similar to a Snapchat account used by Smolenski’s fellow officer Paul Gifford, but an investigation showed that the account was created in the Lebanon Police Station on a day that Gifford was not working, but Smolenski was.

Gifford and Smolenski were both placed on paid administrative leave on the same day in July.

Gifford remains on paid leave, Roberts said.

Grafton County Sheriff Jeff Stiegler said in an interview Friday that Gifford has cooperated with investigators and they do not anticipate filing any charges against him.

Both Smolenski and Cremo declined comment when reached by phone Friday.

A future court date for Smolenski has not been set but Stiegler said his case will be moved to Belknap County to avoid a conflict of interest.

Smolenski, who had been paid his $99,000 salary while on leave, was involved in another high-profile case in 2008 when Strafford resident Scott Traudt was convicted of one count of assaulting an officer and one of disorderly conduct. He was accused of punching then-officer Phil Roberts and body slamming Smolenski during a traffic stop the previous year. Both officers testified at his trial.

Traudt sought a new trial last year saying one of the officers — though it has never been publicly documented as to which one — had a disciplinary mark on his record, making his testimony unreliable.

The New Hampshire Supreme Court rejected Traudt's bid in January.

Anna Merriman can be reached at amerriman@vnews.com or 603-727-3216.

Dover releases review of investigation into fired officer

- By Kimberley Haas Union Leader Correspondent
- Oct 29, 2020 Updated Oct 29, 2020

The findings of an independent review of an internal investigation at Dover Police Department have been released.
Kimberley Haas/Union Leader Correspondent

An internal investigation into a fired Dover police officer that identified five allegations of misconduct was “thorough and fair,” according to an independent review released by city officials.

Ronald “R.J.” Letendre, 47, was accused of breaking four of his wife’s ribs during a fight in Rollinsford on July 10. Rollinsford police determined Sarah Letendre was the primary physical aggressor and R.J. Letendre was the victim of domestic violence, according to the review.

But attorney Eric Daigle wrote in his review that during the internal investigation, five allegations against R.J. Letendre were identified, including additional physical altercations, improper use of his Taser while off-duty, smoking marijuana, theft of evidence and improper storage of evidence in his locker.

“The investigator was methodical and thorough while conducting the investigation and collecting evidence. Based on my review, I agree with the investigator’s conclusions regarding the five additional allegations,” Daigle wrote.

Letendre was fired in August. He was indicted in Strafford County Superior Court on Oct. 15 on a charge of falsifying physical evidence after he allegedly removed a portion of some seized drugs before entering the rest into evidence at the Dover Police Department on Sept. 16, 2016.

The charge carries a sentence of 3½ to 7 years in prison. Letendre is scheduled to be arraigned on Dec. 10.

“I do not anticipate further criminal charges for this case,” Strafford County Attorney Thomas Velardi said by email last week.

Daigle wrote that he did not find any apparent bias in the investigation or its conclusions.

“It is my opinion to a reasonable degree of professional certainty that the investigation is thorough, complete and fair,” Daigle wrote.

Dover City Manager Michael Joyal released the independent review Thursday.

“We all are obviously extremely disappointed by the actions of Mr. Letendre while employed by the city of Dover,” Joyal said. “His actions were lone, selfish and inexcusable.”

Letendre’s wife, Sarah, was charged with simple assault, obstructing the report of a crime, resisting arrest, reckless conduct, disobeying an officer and breach of bail conditions in connection with the July 10 incident.

After Letendre was fired, the Merrimack County attorney dropped all charges against the couple related to the incident, Foster’s Daily Democrat reported.

Straffordnews@unionleader.com

Ex-Dover police officer R.J. Letendre not guilty in felony trial. What the verdict means.


Megan Fernandes
Fosters Daily Democrat
View Comments

DOVER — Ronald "R.J." Letendre was recently found not guilty of falsifying evidence, a verdict that “does not change anything" about his termination from the Dover Police Department in 2020, according to his former boss.

Letendre was charged with falsifying physical evidence after allegedly removing THC-infused Jolly Rancher candies seized by police before they were entered into evidence. THC is the psychoactive compound in marijuana.

Letendre was indicted in 2020 on the Class B felony charge, alleging that as the lead investigator he removed evidence to hinder an investigation. The charge is punishable by 3-1/2 to 7 years in prison.

2020 story: Fired Dover officer R.J. Letendre charged with taking drugs police seized for evidence

Investigation started in summer 2020

Chief William Breault and the Dover Police Department launched an internal investigation into Letendre following an incident at the home of R.J. Letendre and Sarah Letendre, his wife, in Rollinsford.

Sarah Letendre spoke up about a domestic incident between the couple at home July 10, 2020. The case quickly became well-known in the community, with Sarah Letendre's family and other advocates blaming R.J. Letendre in public for her multiple fractured ribs. Rollinsford police arrested Sarah Letendre at the time of the incident and charged her with simple assault and other charges that were later dropped. R.J. Letendre was never charged in connection with the incident.

In a separate incident in 2016, Dover police alleged R.J. Letendre stole THC-infused candies and brought them home. As part of the internal investigation, police examined the drugs that R.J. Letendre entered into evidence as “a gallon sized bag that contained 18 hard candies "labeled Jolly Rancher and 30 mg THC.”

When Dover police interviewed the homeowner that received the package, home security footage and photos indicated then-officer R.J. Letendre did not submit the package as he found it, with the images showing the candies are in a bag that is marked “36 EJRX” that suggests the package contained 36 Jolly Rancher candies. The conclusion made by police led to his indictment that he stole candies before putting the rest in a different bag and entering them into evidence.

Dover probe: Ex-officer 'R.J.' Letendre took drugs, used Taser on wife

The Dover police internal investigation also found R.J. Letendre once used a police Taser on his wife in 2013.

The trial and the verdict

Strafford County Attorney Thomas Velardi said Letendre's trial on the falsifying evidence charge started Feb 2 and lasted about a day.

“I don't think the verdict is reflective of a jury that felt as though the accused did nothing wrong, the facts of the case were much clearer as a theft, most likely in the minds of the jury,” Velardi said. “Because the crime was alleged to have occurred back in 2016, the state was precluded by the statute of limitations from bringing other theories of the case. We, meaning myself and the Dover police, did feel as though the crime that we did go forward on was an appropriate crime. My belief is that the jurors may have found that the defendant's specific intent in removing the evidence was not to impair an investigation but rather to give those items to someone else.”

Velardi said that while the evidence was “fairly uncontroverted” that R.J. Letendre "removed evidence without license or authority from the evidence room," the intention of this conduct was circumstantial.

'With great emotion': Bad Lab Beer Co. closes brewpub in Somersworth

Velardi said that the case went undetected for a number of years, because there was no reason to question it or R.J. Letendre’s police report. His internal review on unrelated matters is what brought it to light. Without the video and photographic evidence provided by the homeowner who mistakenly received the package with drugs Velardi said it may have continued to go unnoticed.

Velardi said he respects the jury’s decision and applauded the Dover Police Department for its work on the case, which included tracking down and digging into files from years ago.

“I think that the citizens of Dover should feel very confident in the integrity of their police department, because this wasn't swept under the rug and they held the department accountable,” Velardi said. “They launched a whole new internal investigation into what happened back on Sept. 16, 2016 with this

relatively routine call. The amount of resources that Dover police put into this to make sure that they were adequately policing their own personnel, frankly, is a model for other departments to follow."

R.J. Letendre's public defender, Carl Swenson, did not immediately respond to requests for comment for this story.

Could Letendre work as a police officer again?

Following an internal investigation in 2020, R.J. Letendre was terminated as a Dover police officer "due to multiple violations of departmental policy," Chief Breault said at the time.

Breault said the not guilty verdict in the falsifying evidence case does not make Letendre eligible to return to his former job in Dover. Breault explained that because Letendre was found by Dover police to be untruthful, Letendre will remain on the state's Exculpatory Evidence Schedule (formerly called the "Laurie List") which includes the names of police officers with credibility issues.

'Laurie List':NH releases secret 'Laurie List' of police officers with credibility issues

New Hampshire Police Standards and Training Council officials have previously said fired officers who seek to continue their career in law enforcement are required to go before the council to plead their case. In the recent case of Killian Kondrup, a former Dover officer who was fired in 2021 due to dishonesty, the council took a strong stance and permanently revoked his certification.

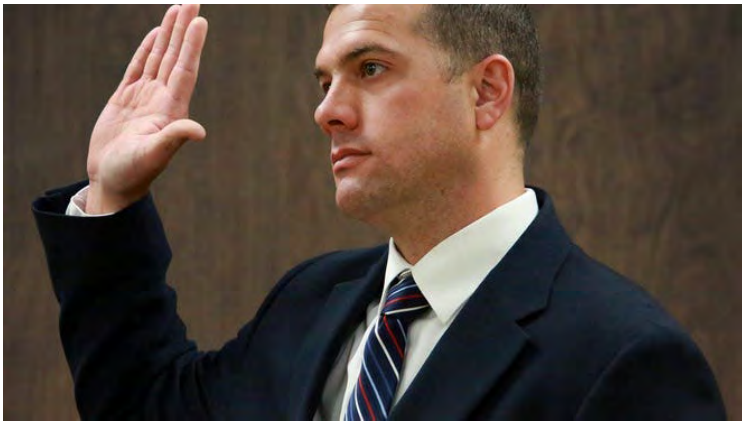
'Career-ender': Why fired police officer's lie about fatal crash means no more 2nd chances

'Lied by omission': Dover police officer loses job, career for lying about double fatal crash on Sixth Street

Ruling: Portsmouth officer fired improperly over $2M inheritance, owed 2 years pay

Elizabeth Dinan

View Comments



PORTSMOUTH — Police officer Aaron Goodwin was poorly managed and improperly fired five years ago, during a dispute over his $2 million inheritance from an elderly resident, entitling him to two years of back pay, an arbitrator ruled in a decision being challenged by the city Police Commission.

The “award” to Goodwin is cited in one of three orders the Portsmouth Herald just obtained after arguing for their release in Rockingham County Superior Court, then the state Supreme Court. Goodwin’s union argued the report is a personnel record and therefore shielded from the public, but the Herald’s lawyer, Richard Gagliuso, won the landmark case, easing the personnel records shield.

Goodwin said in a statement Monday, “I proposed publicly releasing the arbitration decision to the union after it was decided and still believe the findings should be public. In exchange to settle this case with the city, I offered to donate any money owed to me to charity.”

The amount owed Goodwin is about $145,000, the city's labor lawyer Tom Closson said Monday. Police Commission Chair Joe Onosko previously said it is not covered by the city's liability insurance and would have to be paid with tax dollars. The union lawyer representing Goodwin, Peter Perroni, did not immediately return the Herald's message seeking his comment.

In a written statement, the Police Commission said, "The Commission disagrees with the arbitrator's decision to award Mr. Goodwin back pay, and has appealed that portion of the arbitrator's decision to the Rockingham County Superior Court." Closson said the appeal is pending.

The commission also stated it's "pleased with the arbitrator's decision not to reinstate Aaron Goodwin to his position with the Portsmouth Police Department." His union had argued he be returned to work.

Goodwin's June 25, 2015 firing was made by former police chief Stephen DuBois, "with the full support of the Portsmouth Police Commission," it was announced in a press statement at the time.

"The decision comes after extensive review of the findings of the Roberts Report and careful deliberation over six meetings," it was announced.

The Roberts Report was published by a panel led by retired Judge Stephen Roberts and funded with $20,000 approved by the City Council. The report noted Goodwin violated three regulations in the Police Department's Duty Manual and three regulations in the city's Code of Ethics, all pertaining to his large inheritance from the late Geraldine Webber who, her doctor testified, had dementia.

According to the newly released records, Goodwin's union argued the panel's findings could not be used against him because the commission promised all police personnel interviewed, "There would be absolutely no repercussions of

any kind, personally or professionally, to anyone who speaks with the Task Group."

The union also argued Goodwin could not be disciplined for conduct his supervisors were aware of and condoned. The arbitrator wrote two former chiefs and a former deputy chief believed Goodwin could not be disciplined for his off-duty behavior, including inheriting Webber's house, if it wasn't connected to his on-duty behavior.

The report notes Goodwin called Webber almost daily while on duty, visited her three times while on duty and, while command staff knew this, there were no repercussions. He met Webber on duty, while working as a police officer, by all accounts.

"Although the Task Force found Officer Goodwin made poor individual choices, his choices were based on the Command Staff's misinterpretation of the Rules and improper advice," the arbitrator found.

Because Goodwin wasn't told by anyone he was violating the rules and he should have refused Webber's bequests, "the inaction of the Commission and Command Staff mitigates Goodwin's misconduct and just cause to fire him was not established," the arbitrator found.

Goodwin's inheritance was overturned by probate Judge Gary Cassavechia who found Goodwin unduly influenced Webber while she was changing her estate plans to his benefit. The 2015 ruling came after a 10-day probate hearing and overturned Webber's 2012 trust, which had given Goodwin her waterfront home, Cadillac and valuable stocks and bonds.

In a second opinion just released, the arbitrator found the probate court ruling had no bearing on Goodwin's firing two months earlier, but was relevant in determining how much he is owed for his wrongful termination.

In her third of three orders, arbitrator Bonnie McSpirtt found Goodwin is not entitled to get his police job back, but is owed money due to his wrongful discharge. The record shows the city argued for two months of back pay; the time between the task force report and the probate judge's ruling. The union argued for back pay from the date of Goodwin's firing to the date of the arbitrator's decision.

The arbitrator chose neither, instead ruling Goodwin should receive back pay and benefits from his date of termination to Aug. 7, 2017, when he would have been fired if rules were followed. She noted Goodwin was not afforded due process rights, his right to a hearing and an opportunity to be heard prior to his dismissal.

"Clearly, Officer Goodwin is not blameless in this matter since his misconduct is the center of the turmoil in the Department and in the City of Portsmouth for the last seven years," the arbitrator wrote in a 2017 order. "Although I have determined the Department did not have just cause to terminate Officer Goodwin, it is not because he did nothing wrong, it is because the Rule was not enforced correctly and (Goodwin) was improperly supervised when he was not informed his conduct was violating Department Rules and he needed to denounce Ms. Webber's bequests."

View Comments

From:	King, Jessica
To:	Gilles Bissonnette; Gregory V. Sullivan; Henry Klementowicz; Formella, John; Galdieri, Anthony
Subject:	RE: American Civil Liberties of New Hampshire v. New Hampshire Department of Safety, Division of State Police; Supreme Court Docket No.: 2022-0321
Date:	Friday, October 14, 2022 4:59:03 PM
Attachments:	image003.png

Good afternoon Greg,

Thanks for reaching out. The State also assents.

Thank you,

Jessica

Jessica A. King
Assistant Attorney General
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New Hampshire Department of Justice
33 Capitol St.
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Tel. (603) 271-3675
Fax (603) 271-2110

From: Gilles Bissonnette <gilles@aclu-nh.org>
Sent: Friday, October 14, 2022 3:08 PM
To: Gregory V. Sullivan <g.sullivan@mslpc.net>; Henry Klementowicz <henry@aclu-nh.org>; Formella, John <john.m.formella@doj.nh.gov>; Galdieri, Anthony <Anthony.Galdieri@doj.nh.gov>
Cc: King, Jessica <Jessica.A.King@doj.nh.gov>
Subject: RE: American Civil Liberties of New Hampshire v. New Hampshire Department of Safety, Division of State Police; Supreme Court Docket No.: 2022-0321

Greg,

ACLU-NH assents. I am also copying Jessica King who represents the State Police.

Gilles Bissonnette
Pronouns: he, his
Legal Director
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18 Low Avenue, Concord, NH 03301

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From: Gregory V. Sullivan <g.sullivan@mslpc.net>
Sent: Friday, October 14, 2022 2:50 PM
To: Gilles Bissonnette <gilles@aclu-nh.org>; Henry Klementowicz <henry@aclu-nh.org>; john.m.formella@doj.nh.gov; Galdieri, Anthony <Anthony.Galdieri@doj.nh.gov>; jessica.a.king@doj.nh.gov
Cc: DOJ: Attorney General <attorneygeneral@doj.nh.gov>
Subject: RE: American Civil Liberties of New Hampshire v. New Hampshire Department of Safety, Division of State Police; Supreme Court Docket No.: 2022-0321

Counsel: We represent Union Leader Corporation and the New England First Amendment Coalition. In accordance with Rule 30 of the Rules of the New Hampshire Supreme Court, we hereby seek your written consent to file an amicus brief in support of the position of the ACLU. Please respond with your consent or objection. Thank you.

Gregory V. Sullivan, Esq.

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