A compilation of case summaries prepared by the New Hampshire Municipal Association for the period covering October 1, 2019 through September 30, 2020.
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The Court Update is a compilation of case summaries that appeared on the New Hampshire Municipal Association’s (NHMA) website during the past year and are presented here as instructional material for municipal officials. Summaries have been compiled primarily from New Hampshire Supreme Court slip opinions; U.S. Supreme Court, federal court and superior court decisions of significance have been included. The cases in this book cover the period from October 1, 2019 to September 30, 2020. Procedural aspects not germane to the central holding of a case have been left out.

Commentary is intended for municipal officials and is meant simply as a starting point in the local decision-making process. Nothing included in these summaries should be construed as legal advice on pending controversies or as a substitute for consultation with your municipal attorney.

NHMA’s Legal Services attorneys are available to answer inquiries and provide general legal assistance to elected and appointed officials from member towns and cities. Attorneys can be reached by phone at 603.224.7447, or by email at legalinquiries@nhmunicipal.org.
Monadnock Regional School District v. Monadnock District Education Assoc.
New Hampshire Supreme Court
Docket No. 2019-0134
July 8, 2020

An unspent annual appropriation will lapse unless those funds are encumbered by a legally enforceable obligation that attaches to the funds before the end of the fiscal year.

The Monadnock Regional School District and the Monadnock District Education Association -NEA-NH had entered into a collective bargaining agreement that annually allocated a lump sum amount for health insurance for Association members. The Association was then responsible for selecting insurance plans and determining the amount to be contributed by each eligible employee. Any amount of the allocated healthcare budget not expended in any fiscal year would be deposited into a health care pool to offset healthcare coverage for employees electing plans that exceeded the District’s allotment per employee. There was a health care pool fund balance as of June of 2016 in the amount of $392,381 that the District claimed could not be further distributed to employees because the funds had lapsed pursuant to RSA 32.

Relying on RSA 32:7 the District took the position that since all appropriations lapse at the end of the fiscal year, any unexpended portion in the health care pool could not be expended without further appropriation. The Association claimed that that the funds in the pool had become encumbered by a legally enforceable obligation and thus the funds in the pool did not lapse. RSA 32:7, I.

The Supreme Court ruled that to prevent the lapse of the unspent portion of an appropriation two conditions must be satisfied. First, the unspent funds must be encumbered by a legally enforceable obligation for their expenditure. Second, the obligation must attach to the funds before the end of the fiscal year for which they were appropriated.

In this instance the CBA required that unexpended health care funds that were budgeted each year were to be placed in the pool. Because the pool funds were encumbered by an obligation for their expenditure, and because each year’s unexpended health insurance appropriation was required to be placed in the pool once the District satisfied its yearly contribution to premiums and buyout payments, the required obligation arose each year no later than at the moment the District satisfied its yearly contribution. Thus, the Court concluded that both conditions of RSA 32:7, I, were satisfied as to the unspent amount of each year’s health insurance appropriation, and the funds in the pool did not lapse could be distributed to employees according to the CBA.

The Court rejected the argument of the District that the funds had to be expended before the end of the fiscal year. The Court ruled that RSA 32:7, I placed no requirement on the time at which the required expenditure must occur.

Practice Pointer: Under RSA 32:7, I, in order to prevent the lapse of an unspent portion of an appropriation through a legally enforceable obligation, two conditions must be satisfied. First, the unspent funds must be encumbered by a legally enforceable obligation for their expenditure. Second, the obligation must attach to the funds before the end of the fiscal year for which they were appropriated.
League of Women Voters v. Gardner
Hillsborough County Superior – Northern District
Case No. 226-2017-CV-00433
April 8, 2020

SB 3 struck down by the Court as unconstitutional for unreasonably burdening the right to vote and violating equal protection under the New Hampshire Constitution.

In 2017 SB3 amended voter registration laws imposing new proof of domicile requirements. Prior to the statute’s effective date suit was instituted arguing the law was unconstitutional as it would effectively suppress voter turnout. Prior Superior Court orders enjoined enforcement of the criminal and civil penalties associated with SB 3, and later enjoining SB 3 in its entirety from going into effect.

The Superior Court has now ruled that the SB 3 mandated voter registration form was unreadable and difficult to understand, and that SB3 will increase registration time for voters resulting in longer lines. Strong trial court evidence demonstrated that SB 3 would suppress voter turnout. Furthermore, SB 3 was unique when compared to other States by criminalizing the failure to return paperwork relating to election registration. The Court concluded that SB 3 disproportionally burdens young, mobile, low-income and homeless voters, and thus imposes an unreasonable and discriminatory burden on the rights of voters in New Hampshire. That any perceiving increase in the integrity of New Hampshire’s elections due to SB 3 is illusory. Consequently, SB 3 in its entirety is facially unconstitutional. SB 3 was also declared unconstitutional due to a denial of equal protection.

The State of New Hampshire failed to meet its burden to prove under intermediate scrutiny that the burdens imposed on voting were necessary to advance the important governmental interest of thwarting voting fraud.

SB 3 struck down by the Court as unconstitutional for unreasonably burdening the right to vote and violating equal protection under the New Hampshire Constitution.

Practice Pointer: Although this superior court order is subject to appeal to the New Hampshire Supreme, in the interim the decision is binding on local election offices. All of the voter registration requirements imposed by SB 3 adopted in 2017 are unconstitutional and unenforceable.
Appeal of Town of Loudon
New Hampshire Supreme Court
Docket No. 2019-0229
March 17, 2020

Employees with supervisory duties as defined in their job descriptions should have been excluded from a proposed collective bargaining unit

The following 11-employees of the Town of Loudon tried to form a bargaining unit with the assistance of the Teamsters: one police sergeant, one police corporal, four police patrol officers, three full-time firefighters, one part-time firefighter, and one fire department administrative assistant. The New Hampshire Public Employee Labor Relations Board (PELRB) certified the bargaining unit. The Town appealed.

RSA 273-A:8, I requires that a newly certified bargaining unit contain a minimum of 10 members. In addition, the town and union agreed that one of the 11 members, the part-time firefighter did not qualify, therefore reducing the number in the certification unit to 10 in the amended PELRB order.

This appeal turned on the language in RSA 273-A:8, II stating, “[p]ersons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.”

Despite the police chief’s testimony that “he considers the sergeant and corporal to be ‘glorified patrol officers,’ and that he does not believe that their inclusion in the bargaining unit would create a conflict among employees,” the job description of the sergeant and corporal, and other testimony from the chief demonstrated that they have supervisory authority over the other officers in the bargaining unit. Therefore, they would be excluded under RSA 273-A:8, II. As such, the certification unit would only number 8, falling below the 10-person threshold for certification. As a consequence, the N.H. Supreme Court reversed the decision of the PELRB to certify the bargaining unit.

Practice Pointer: Municipalities should carefully review the requirements of RSA 273-A:8 when approached by employees seeking to certify a bargaining unit to ensure that the persons attempting to join qualify pursuant to the requirements of RSA 273-A:8.
An employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

This consolidation of three similar cases by the U.S. Supreme Court relied on, essentially, the same fact pattern. In each of the three cases, an employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status. In each case, the former employee brought suit under Title VII of the Civil Rights Act of 1964 alleging unlawful discrimination on the basis of sex.

Title VII of the Civil Rights Act of 1964 makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e–2(a)(1).

The Court analyzed the text of Title VII to conclude that the phrase “because of . . . sex” means that an employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

Practice Pointer: If an employer takes adverse employment action, or retaliates, against an employee on the basis of the employee’s homosexuality or transgender status that action can now support a discrimination claim based on sex under Title VII of the Civil Rights Act of 1964.
New Hampshire’s criminal defamation statute, RSA 644:11 declared unconstitutional under the First and Fourteenth Amendment to the U.S Constitution.

The Plaintiff has been twice prosecuted for criminal defamation under New Hampshire’s criminal defamation statute. That statute, RSA 644:11, provides: “A person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.”

In this action, the Plaintiff claimed that he feared future arrests or prosecutions for speech criticizing law enforcement and other public officials and sought a pre-enforcement challenge the statute, alleging that it violates the First and Fourteenth Amendments to the U.S Constitution.

The first basis of the Plaintiff’s challenge was that the statute was void for vagueness - the criminal defamation statute arguably fails to provide “people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” and what speech is acceptable. The Court agreed, stating “[e]ven when construing the criminal defamation statute in line with its ‘knowing’ scienter requirement, the statute may still not adequately delineate what speech must be known to have the tendency ‘to expose any other living person to public hatred, contempt or ridicule.’”

The Court also agreed with the Plaintiff’s second challenge, that that the criminal defamation statute may be prone to arbitrary enforcement largely on the basis of “New Hampshire’s distinctive criminal process [which] may exacerbate the potential for arbitrary or selective prosecutions.” The “distinctive criminal process” referred to by the Court is “New Hampshire’s municipal police departments … ability to prosecute misdemeanors like criminal defamation without the oversight of a licensed, state-sanctioned attorney.” “[T]he discretion afforded to police departments to prosecute misdemeanors, taken together with the criminal defamation statute’s sweeping language, may produce more unpredictability and arbitrariness than the Fourteenth Amendment’s Due Process Clause permits.”

Note: This case is still pending trial at the District Court, and the final result may be different than the preliminary order.

Practice Pointer: Law Enforcement agencies should consider RSA 644:11 unconstitutional unless or until the District Court orders otherwise. In addition, law enforcement agencies should take note that the court may determine police-prosecutors, who work for police departments, may be held to a different standard, giving them greater deference, than attorney-prosecutors, who have greater independence by virtue of their appointment by select boards pursuant to RSA 41:10-a and formal legal training.
Bellevue Properties v. Town of Conway
New Hampshire Supreme Court
Docket No. 2019-0302
August 25, 2020

The New Hampshire Supreme Court affirmed the discontinuance of a road by the Town of Conway pursuant to RSA 231:43.

The Plaintiff owned a hotel abutting a retail development known as Settler’s Green in the Town of Conway. One of the three routes to access the hotel was McMillan Lane, a Class V highway.

Settler’s Green proposed a retail development that would require the discontinuance of McMillan Lane, as the development would span the road. Settler’s Green proposed an alternate, private means of access.

A warrant article to conditionally discontinue the road was drafted by the Town, providing that Settler’s Green continue to keep McMillan Road open until a suitable replacement road was constructed. The replacement road, although private, would continue to be open to the public. After an amendment at Deliberative Session, the article was adopted by Town Meeting.

The Plaintiff, reasoning that the discontinuance would cause harm to the hotel’s business, sued. On appeal, the Plaintiff made two claims: (1) the Superior Court did not correctly apply the balancing test formulated in Hinsdale, although Hinsdale formulated its test in relation to the interests of one town as compared to another town, rather than a private individual compared to a town. Here, the New Hampshire Supreme Court held that “when the town’s decision to discontinue a highway is based upon other interests, in addition to the interest in alleviating the burden of maintenance, the trial court may consider those interests in reviewing the town’s decision.”

Regarding the balancing test itself, the Court found that the multiple other entries to the hotel, the uncontested testimony of Settler’s Green’s principal that it would be willing to give an easement to the hotel over the new road, and the continued actions of Settler’s Green to hold open access to the hotel evidenced that the Superior Court correctly applied the balancing test. Thus, the Court affirmed the Superior Court decision.

Practice Pointer: In light of these two recent decisions where the Court looked to the motivations of the town in discontinuing a highway, a town seeking to discontinue a highway should have town officials carefully explain why the discontinuance would be of a benefit to the town during deliberative session or town meeting, and ensure that such explanation is captured in the minutes of that public meeting.
Objective testimony from residents, combined with personal knowledge of observable facts by board members can refute expert opinions

The NH Supreme Court upheld a decision of the Milton Zoning Board of Adjustment that a proposed campground expansion would be an undue nuisance or serious hazard to pedestrian or vehicular traffic notwithstanding contrary expert traffic engineering evidence. Three Ponds Resort sought a special exception to substantially expand its seasonal campground. A central feature of the hearings before the ZBA was whether the road providing access to the campground could reasonably support the additional traffic that the increased number of campsites would generate.

A traffic study provided by Three Ponds, along with an independent technical review of the submitted traffic study, both concluded that the additional campground traffic was not expected to have an undue or inordinate impact on traffic safety. Due to the apparent uncontradicted content of these traffic studies, Three Ponds argued that Condos East Corp. v. Town of Conway, 132 N.H. 431 (1989), and Continental Paving v. Town of Litchfield, 158 N.H. 570 (2009) precluded the ZBA from reaching a contrary result.

The Supreme Court distinguished Condos East and Continental Paving ruling that the ZBA was entitled to question and reject the conclusions of the expert’s traffic assessment by relying on objective facts provided through the testimony of town residents and the personal knowledge of board members. The Court observed that the methodology of the traffic study did not consider pedestrian traffic on the impacted town road. Furthermore, these were not personal opinions, but rather descriptions of the actual experience of using the road. The ZBA also relied upon New Hampshire Department of Transportation Minimum Geometric & Structural Guides for Local Roads and Streets (Guidelines) that contradicted the traffic study’s statement that Townhouse Road had “ample width.” The ZBA also had an objective basis to conclude that the traffic study did not accurately represent peak traffic on the affected town road.

The Supreme Court concluded that the ZBA could have reasonably concluded the traffic study did not fully reflect the current conditions the affected town road; that the road was not wide enough to accommodate existing traffic comfortably, and that increasing the number of wide vehicles using the narrow road — with no shoulders or sidewalk — would endanger people walking, cycling, or running on the road.

Practice Pointer: Critical examination of the methodology of an expert traffic report, combined with direct evidence of objective evidence provided by abutters, residents and board members can support a land use board’s decision to reject the conclusions of expert testimony and reports.

DISCLAIMER: This is an unpublished opinion. Readers should be aware that Supreme Court Rule 20(2) states that an order disposing of any case that has been briefed but in which no opinion is issued, shall have no precedential value. However, it may be used for persuasive purposes.
City Mask Ordinance Legal Under New Hampshire Law

On May 21, 2020, at the request of the City’s Board of Health, the Nashua Board of Aldermen passed an ordinance requiring members of the public and business employees to use face coverings or masks under certain circumstances. The plaintiff, Andrew Cooper, filed an “emergency” motion for a preliminary injunction to prevent the enforcement of the ordinance.

The plaintiff presented several arguments which can be placed into three broad categories: statutory, preemption, and constitutional. First, statutory claims – i.e. the City lacked the authority to pass the ordinance and it failed to observe statutory notice requirements. Second, a preemption claim – state law preempted any local ordinance. Third, constitutional claims – the ordinance variously violated his right to privacy, right to procedural due process, and right to free speech and assembly.

Statutory Claims

Putting aside the notice argument, which focused on the technicalities of notice, the major argument under the statutory claim regarded the authority of the City to pass such an ordinance. Analyzing the issue, the Court determined that two separate lines of authority existed: RSA 47:17, XV and the implicit “police power” of municipal government.

RSA 47:17, XV pertains to cities. It states, in relevant part, that cities “may make any other bylaws and regulations which may seem for the well-being of the city; but no bylaw or ordinance shall be repugnant to the constitution or laws of the state.” The Court stated that includes a mask ordinance.

The “police power” is the broad and inherent ability of government to regulate “health, welfare, and public safety.” See State v. Lilley, 171 N.H. 766, 783 (2019) (discussing the power). The structure of New Hampshire’s system of government, making municipalities subdivisions of the state, causes them to inherit the ability “to make bylaws for a variety of purposes which generally fall into the category of health, welfare, and public safety.” Id. at 783. Thus, the City could craft and enforce an ordinance pertaining to a public health threat.

Preemption Claims

The plaintiff argued that, by issuing a number of "Emergency Orders" pursuant to the declared State of Emergency pertaining to COVID-19, the Governor created “a comprehensive regulatory scheme” which occupied the entire regulatory space meaning that the subdivisions of the state were impliedly preempted in their attempts to regulate the same issue. The Court disagreed.

First, the Court noted that the “Emergency Orders” were not a statutory scheme – an important legal distinction. Then, the Court further explained that, even if it accepted that the “Emergency Orders” qualified as a “statutory scheme,” the ordinance would have to permit something which a state statute prohibits or vice versa or frustrates a statute’s purpose. Here, the Court noted that the ordinance, requiring masking in all retail establishments, actually is in alignment with the Emergency Orders pertaining to retail establishments. And, in addition, the Governor was a party to the hearing and did not assert that his orders preempted the municipal ordinance, which would be expected if he intended his orders to preempt local regulation.

Constitutional Claims

The plaintiff advanced three constitutional claims. In analyzing those claims, the Court looked to
Jacobson v. Massachusetts, 197 U.S. 11 (1905), and subsequent New Hampshire cases adopting and following the reasoning in Jacobson. In short, these cases adopt Cicero’s maxim salus populi suprema lex esto (the health of the people is the supreme law) and explain that the health of the many overrule the rights of the few in the context of preventing or combating the spread of infectious disease where the prescribed treatment is not merely a pretext to rob the individual or his or her rights.

Based on this analysis of the existing case law, the Court determined that the ordinance has a “real or substantial relation” to public health and safety and limited to circumstances where viral transmission may occur. Therefore, it is a valid exercise of governmental authority and the constitutional claims fail for this, as well as for several other enumerated reasons.

Practice Pointer: Municipalities should consider having counsel review proposed ordinances to prevent or combat COVID-19 to ensure that they comply with the complex intersection of statutory authority, preemption, and individual constitutional rights.
ACLU of NH & Concord Monitor v. City of Concord  
New Hampshire Superior Court  
December 20, 2019

**Product specifications of covert communications equipment used by Police Department exempt from disclosure under Right-to-Know Law**

The City of Concord’s budget contained a line for $5,100 for “Covert Communications Equipment” associated with the City’s police department. The ACLU and Concord Monitor both filed Right-to-Know requests to learn more about the Covert Communications Equipment.

The Concord Police Department responded to both Right-to-Know requests with a series of records, including twenty-nine pages of redacted documents. The redactions concealed the name of the vendor of the equipment, the “governing law” provision in the City’s Agreement with the vendor, the nature of the equipment, what type of information the vendor gathers, and how the vendor uses that information.

Unsatisfied with the disclosure, both the ACLU and Concord Monitor filed suit in the Superior Court pursuant to RSA 91-A:7.

Following *Lodge v. Knowlton*, 118 N.H. 574 (1978), the Superior Court determined that Law Enforcement Exceptions (a) Interference with Enforcement Proceedings, (e) Techniques and Procedures, and (f) Danger to Life and Physical Safety applied in this circumstance. Notably, in an *in camera* hearing, the City showed that ‘enforcement proceedings are pending or reasonably Anticipated’ and that ‘disclosure of the requested documents could reasonably be expected to interfere with those proceedings,’ satisfying (a). Further, the City, in that hearing, ‘demonstrate logically how the release of the requested information might create a risk of circumvention of the law,’ satisfying (e).

Last, the City ‘demonstrated that revealing the redacted content could lead to the identification of the equipment used and of the manner in which it is employed and knowledge of such information could reasonably be misused for “nefarious ends,” including physical and deadly harm, satisfying (f).

Note: This case is presently on appeal at the New Hampshire Supreme Court.

**Practice Pointer:** Prior to publicly disclosing information that will lead to public inquiry, law enforcement agencies should carefully evaluate the disclosure in light of the FOIA standards under *Lodge v. Knowlton* to determine whether subsequent disclosures will be necessary as a result of the first disclosure.
**Report about alleged misconduct by elected officials acting in their capacity as employers not exempt as internal personnel practice; members of a governing body cannot be denied access to attorney-client communications.**

SAU #55 is comprised of Hampstead School District and the Timberlane Regional School District. All five members of the Hampstead School Board serve as members of the SAU Board. Nine members of the Timberland School Board also serve as members of the SAU Board.

After a SAU employee complained that a member of the SAU Board engaged in workplace harassment, the Chair of the SAU arranged for an investigation by outside legal counsel. The engagement letter between the SAU and those attorneys provided that the investigation was done on behalf of the SAU and any report would be subject to the attorney-client privilege. When that investigation was finished the Chair of the SAU announced at a public meeting that the attorney investigators concluded that the allegations of workplace harassment had no merit. When the written report of the investigating attorneys was completed the Hampstead contingent of the SAU Board requested access to the report, including seeking access under RSA 91-A. SAU’s legal counsel informed Hampstead members of the SAU that the report was exempt from disclosure as an “internal personnel practice” under RSA 91-A:5, IV, and because the report implicates the attorney-client privilege and work product doctrine.

The Superior Court rejected the argument by the SAU that the legal principles found in *Union Leader Corp v. Fenniman*, 136 N.H. 624 (1993) should be extended to exempt not only investigations into employee misconduct but also exempt investigations into official misconduct by those who hold elected positions and who serve in the role as employers. On the application of the attorney-client privilege and work product privilege doctrine, the Superior Court relied on *Hampton Police Ass’n, Inc. v. Town of Hampton*, 162 N.H. 7 (2011) ruling that to resist non-disclosure use of a balancing test was necessary. That balancing test provides that the party resisting disclosure must prove that disclosure is likely to: (1) impair the information holder’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. Based upon the public declaration of by the Chair of the SAU that the conclusions of the report found no official misconduct, and based on the unique situation that members of the SAU governing body were being denied access, and Court found that the balancing test mandated disclosure to the Hampstead members of the SAU.

**Practice Pointer:** Although this Superior Court order is subject to appeal to the New Hampshire Supreme, the decision does provide guidance that the exemption for “internal personnel practices” does not extend to investigations of official misconduct by elected officials in their capacity as employers of public employees. The decision also clarifies that in certain instances the claim of attorney client privilege can be subject to assessment using a balancing test. Would disclosure (1) impair the information holder’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained?
The “internal personnel practices” exemption under RSA 91-A:5, IV only applies to records of the internal rules and practices governing an agency’s operations and employee relations, and not information concerning the performance of a particular employee.

The NH Supreme Court overruled its decision in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) to the extent that decision too broadly interpreted the “internal personnel practices” exemption under RSA 91-A:5, IV. In Fenniman the Court had ruled that under the “internal personnel practices” exemption a public agency’s records concerning the internal discipline of an employee were categorically exempt from disclosure. The Court has now concluded that the “internal personnel practices” exemption only applies to a narrow set of governmental records pertaining to an agency’s internal rules and practices governing operations and employee relations.

This matter came before the Court on appeal from a Superior Court decision that denied public access to an arbitration ruling concerning the dismissal of a Portsmouth police office. The Superior Court relied on Fenniman when it declared the arbitration ruling exempt from disclosure. Reviewing the language of RSA 91-A:5, IV, and considering past rulings and decisions by the federal courts, the Supreme Court has narrowed the interpretation of “internal personnel practices.” Henceforth, the “internal personnel practices” exemption only applies to records pertaining to the internal rules and practices governing an agency’s operations and employee relations, and not information concerning the performance of a particular employee. By way of comparison a similar internal personnel practices exemption under the federal Freedom of Information Act, the phrase refers to rules and practices dealing with employee relations or human resources, including such matters as hiring and firing, work rules and discipline, compensation and benefits, regulation of lunch hours, and statements of policy as to sick leave.

Because records pertaining to an employee’s work performance or discipline are typically maintained in a personnel file, on remand the Court has directed the Superior Court to determine whether the arbitration decision should be disclosed based upon a different clause in RSA 91-A:5, IV, “personnel . . . files whose disclosure would constitute invasion of privacy.” The Court concluded that records documenting the history or performance of a particular employee fall within the exemption for personnel files. To that end, the Superior Court must now determine: (1) whether the material can be considered a ‘personnel file’ or part of a ‘personnel file’; and (2) whether disclosure of the material would constitute an invasion of privacy. This will require the Superior Court to determine whether the arbitration decision is, or is contained in, a personnel file. If not, the “personnel … files” exemption does not apply. Reid v. N.H. AG, 169 N.H. 509, 528 (2016). If the arbitration decision is part of the officer’s personnel file, then whether the disclosure would constitute an invasion of privacy would be based upon the well-established three-step analysis:

First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.

Second, 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, balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure. Reid v. N.H. AG, 169 N.H. 509, 528-29 (2016).

Practice Pointer: Records that document disciplinary matters involving a municipal
employee that are made part of the employee's personnel file may be exempt from disclosure if that disclosure would invade a protected privacy interest of the employee and that disclosure does not inform the public about the conduct and activities of their government. However, if the disciplinary record would not invade a protected privacy interest of the employee, or, where the public interest in the disciplinary record outweighs the privacy interest of the employee, then the record must be disclosed. Since an administrative rule issued by the NH Department of Labor, NH Admin Rule Lab 802.08, states that “Personnel File” is defined as personnel records created and maintained by an employer and pertaining to an employee including and not limited to disciplinary documentation, it would be the better practice to keep and maintain all records concerning performance evaluations and disciplinary documents in an employee's personnel file.
The NH Supreme Court overrules its decision in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) that “internal personnel practices” are categorically exempt from disclosure under RSA 91-A:5, IV. The Court will now require that the disclosure of internal personnel practices will be subject to a balancing test to determine whether such materials are exempt governmental records.

The Town of Salem had engaged a nationally-recognized consulting firm to critically examine the internal operations of its police department. Upon completion, that audit report was voluntarily released to the public with appropriate redactions consistent with RSA 91-A:5, IV. After release the Union Leader and ACLU-NH filed suit seeking an unredacted copy. The trial court upheld the Town’s redactions under the “internal personnel practices” exemption.

On appeal the Supreme Court concluded that the Fenniman per se rule is inconsistent with the historical and current interpretation of the RSA 91-A:5, IV for “confidential, commercial, or financial information.” Consequently, the Court overruled Fenniman to the extent that it adopted a per se rule of exemption for records relating to “internal personnel practices.” As stated by the Court in Seacoast Newspapers v. Portsmouth, 173 N.H. ___, ___ (decided May 29, 2020) (slip op. at 11) the “internal personnel practices” exemption applies narrowly to records relating to the internal rules and practices governing an agency’s operations and employee relations. In the future, the balancing test used for other categories of records listed in RSA 91-A:5, IV shall apply to records relating to “internal personnel practices.” Determining whether the exemption for records relating to “internal personnel practices” applies will require analyzing both whether the records relate to such practices as redefined in the Seacoast Newspapers decision, and whether their disclosure would constitute an invasion of privacy.

The Court then remanded this matter back to the trial court for a determination of whether the information redacted from the audit report must be disclosed. The Superior Court must first determine whether the redacted information relates to the internal rules and practices governing the Salem Police Department’s operations and employee relations. If those redactions are “internal personnel practices” then the court must determine if the disclosure of that information would constitute an invasion of privacy based upon the well-established three-step analysis. Reid v. N.H. AG, 169 N.H. 509, 528-29 (2016).

Practice Pointer: The exemption from disclosure under RSA 91-A:5, IV for “internal personnel practices” applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits. If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy. First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Second, 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, balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.
Paul Martin v. City of Rochester  
New Hampshire Supreme Court  
Docket No. 2019-0150  
June 9, 2020

A committee of city employees that provides advice to planning board applicants is not a public body under the Right-to-Know Law; 50 cents per page for copying is permissible under 91-A.

The NH Supreme Court narrowly interprets the definition of “advisory committee” in RSA 91-A:1-a, ruling that the City of Rochester’s Technical Review Group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law.

The Rochester City Manager appointed city employees to the TRG to provide advice to planning board applicants on their proposed projects. Each member of the TRG would suggest changes in accordance with city regulations, laws, and policies. After the TRG meeting the city planner prepared a summary of the comments made by each TRG member that was provided to the applicant, placed in the planning board file, and made available for public inspection. The plaintiff sought access to the TRG meetings claiming they were held in violation of RSA 91-A because members of the public were not permitted to attend. The Supreme Court concluded that because the TRG’s primary purpose was not to provide the appointing authority with advice or recommendations concerning the formulation of any public policy or legislation it was not an advisory committee as defined in RSA 91-A:1-a, I. When such a committee meets it would not be deemed a public body and would not be required to permit members of the public to attend such committee meetings. 50 cents per page for the first 10 pages and 10 cents per page thereafter is a permissible copying fee for public records under RSA 91-A:4, IV (d).

The plaintiff also challenged the city’s copying fee schedule as applied to public records sought under RSA 91-A:4. The city charges a fee of fifty cents per page for the first ten pages and then ten cents per page thereafter. Based on his calculations the plaintiff argued that only a rate of four cents per copy would comply with RSA 91-A:4, IV. The Supreme Court agreed with the trial court that testimony of the city manager was adequate evidence that the city’s fee schedule was commensurate with the actual cost of providing the copy. The Court noted that the legislature did not mandate the use of a formulaic method for determining the actual cost for copying. Thus, the testimony provided by the city manager that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was sufficient.

Practice Pointer: A committee formed by a town official or public body that only offers direct advice to a person seeking municipal permits or approvals, and does not offer the official or public body advice or recommendations concerning the formulation of any public policy or legislation is not an advisory committee as defined in RSA 91-A:1-a, I. When such a committee meets it would not be deemed a public body and would not be required to permit members of the public to attend such committee meetings. 50 cents per page for the first 10 pages and 10 cents per page thereafter is a permissible copying fee for public records under RSA 91-A:4, IV (d).
The NH Supreme Court affirms the ruling of the Hillsborough Superior Court that the three-year limitation on the duty of a municipality to pay excess proceeds from the sale of tax deeded property is unconstitutional.

When the NH Supreme Court originally heard this case it determined that the Town had correctly tax-deeded the property in favor of the Town and held that the statutory scheme spanning RSA 80:88 - :90 prohibited a prior owner from claiming excess proceeds from any future sale of the property after the three year period lapsed. Polonsky v. Bedford, 171 N.H. 89 (2018) (Polonsky I). The Court then sent the case back to Superior Court to address whether RSA 80:89, VII constituted an unconstitutional taking in violation of Part I, Article 12 of the New Hampshire Constitution. Under RSA 80:89, VII the duty of a municipality to provide excess proceeds from the sale of property acquired by tax deed terminates three years after the recording date of the deed.

Agreeing with the Superior Court, the Supreme Court ruled that the three-year limitation on the town’s duty to pay excess proceeds under RSA 80:89, VII is an unconstitutional taking under Part I, Article 12. Excess proceeds that were not returned because the three-year redemptive period expired can be recovered by the former owner. Based on the Court’s prior rulings in Estate of Ireland v. Worcester Ins. Co., 149 N.H. 656 (2003) and in Lee James Enterprises v. Town of Northumberland, 149 N.H. 728 (2003) this decision will have a retrospective application of 10 years under RSA 80:78.

Practice Pointer: As a general rule, municipalities should sell tax deeded properties within three (3) years of recording the tax deed, following the procedures in RSA 80:88 and 80:89. If there is some compelling reason to not re-sell (e.g. it is environmentally sensitive wetland/marsh) the municipality could vote to retain it (RSA 80:80(V)) at which point the municipality will need to tender a former owner a payment equal to fair market value, less all accrued taxes, interest and other items the municipality may retain. When tax deeded property is not sold within the first three years, the former owner must still be provided notice to re-acquire the property or paid any excess proceeds as provided under RSA 80:89 and RSA 80:90.
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NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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