

The State of New Hampshire

Supreme Court

No. 98-710, Appeal of Trooper Mark Armaganian and Trooper Theodore Korontjis

TO THE CLERK OF NH PERSONNEL APPEALS BOARD 96-D-3,4

I hereby certify that the Supreme Court has issued the following order in the above-entitled action:

November 13, 2001.

BROCK, C.J. Reversed. BRODERICK and DALIANIS, JJ., concurred; DUGGAN, J., with whom NADEAU, J., joined, dissented.

December 21, 2001

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

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THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 98-710

APPEAL OF MARK ARMAGANIAN & a.
(New Hampshire Personnel Appeals Board)

November 13, 2001

Donchess & Notinger, P.C., of Nashua (James W. Donchess on the brief and orally), for the petitioners.

Philip T. McLaughlin, attorney general (Walter L. Maronev, senior assistant attorney general, and Sheri J. Kelloway, for the department of safety, on the brief, and Mr. Maronev orally), for the respondent.

BROCK, C.J. The petitioners, Troopers Mark Armaganian and Theodore Korontjis (troopers), appeal a decision of the personnel appeals board (PAB). The troopers challenge both the PAB's conclusion that they conspired to obtain an unauthorized witness fee for Trooper Armaganian and the PAB's decision to uphold the sanction of major discipline for each trooper. We reverse.

The following facts are not in dispute. Armaganian was scheduled to appear in Hampton District Court to prosecute a speeding case on the morning of January 19, 1995. Because he was off-duty on January 19, 1995, Armaganian hoped to find another trooper to settle the case for him so that he would not need to go to court on his day off. Korontjis, who was on duty that day, spoke with Armaganian by telephone and agreed to handle his speeding case for him.

Korontjis settled Armaganian's case when he was at Hampton District Court on January 19, 1995, and Armaganian did not need to testify in court. Nevertheless, Korontjis entered Armaganian's name on the court witness list and, at Armaganian's

request, completed and signed Armaganian's name to a certification of off-duty court appearance, indicating that Armaganian was entitled to a witness fee for the case which Korontjis had settled. Armaganian later completed a weekly duty report indicating that he was entitled to a witness fee on January 19, 1995, in connection with the disposition of the case scheduled for that day in Hampton District Court.

The New Hampshire Division of State Police conducted an internal investigation to determine if the troopers had conspired to obtain an unauthorized witness fee for Armaganian. In connection with the investigation, the troopers were required to submit to polygraph examinations.

Following a hearing, both troopers were notified that they would be suspended without pay for eleven days on charges that they "conspired . . . to obtain an unauthorized court witness fee [for Armaganian] when both Trooper Armaganian and Trooper Korontjis knew that Trooper Armaganian was not in attendance in court." Under the applicable rules, a suspension in excess of ten days is considered major discipline, rendering both troopers ineligible for promotion for a period of seven years.

The troopers appealed and the PAB held a de novo hearing. At the hearing, the parties offered conflicting evidence about precisely what had transpired on the morning of January 19, 1995. The troopers testified that Armaganian called the station to try to find someone to handle his case at Hampton District Court that morning. He reached Korontjis. According to both troopers, they discussed Korontjis' handling the case, and Korontjis told Armaganian that he would try to resolve the case by plea and would call Armaganian back if he were unable to do so. However, the troopers denied that they discussed Korontjis' signing Armaganian in at the courthouse. Armaganian testified that Korontjis agreed to call him back to let him know if the case had been resolved.

According to Armaganian, he began to get nervous around 8:30 a.m. because he had not yet heard from Korontjis. He knew that if Korontjis did not reach a plea with the speeder, and if Armaganian were not there to prosecute the case, he would be disciplined for allowing the case to be dismissed for lack of prosecution. Therefore, according to Armaganian, he drove to Hampton District Court. When he arrived, he saw Korontjis in the parking lot, where Korontjis told him that he had resolved the case. Because he believed he was entitled to be paid for going to the court, he asked that Korontjis sign him up on the court list indicating that he had been present. Korontjis testified that he saw Armaganian in the parking lot, and also believed Armaganian was entitled to be paid. Therefore, he put Armaganian's name on the list. No other witnesses testified at the PAB hearing that they had seen Armaganian at the courthouse that day.

Trooper Debra Winters offered a conflicting version of the events of the morning of January 19, summarized in the PAB decision as follows:

Trooper Debra Winters testified that on the morning of January 19, 1995, just before 8:00 a.m. at the Troop A barracks, Trooper Korontjis asked her if she had any cases scheduled that day in Hampton District Court. When she replied that she did not, he informed her that he needed to call the court to see if one of his own cases had been continued. He also commented that he had to be at Hampton District Court to ". . . take care of something for Mark because he was too [expletive] lazy to get out of bed." Ms. Winters testified that a short time later, the dispatcher called down to the trooper's room to say that Trooper Armaganian was on the phone, or that Trooper Korontjis should telephone Trooper Armaganian. Although she was unsure who initiated the call, she was present during the ensuing telephone conversation between Troopers Armaganian and Korontjis. Trooper Winters testified that she overheard Trooper Korontjis say, "Don't worry about it, brother, I'll just take care of you," and "I'll take care of it." She testified that later in that same conversation, she heard Trooper Korontjis tell Trooper Armaganian, "Don't worry about it. I'll just sign your name in."

The PAB found Trooper Winters' testimony credible and concluded that there was sufficient credible evidence that Troopers Armaganian and Korontjis agreed to have Korontjis enter Armaganian's name on the witness list at Hampton District Court when both troopers knew that Armaganian did not intend to appear for court that day. The PAB also concluded that "the requisite acts in furtherance of the agreement occurred when Trooper Korontjis entered Trooper Armaganian's name onto the Hampton District Court witness list, and when he later completed the off-duty certification of court appearance form for Armaganian."

The troopers moved for a rehearing arguing, in pertinent part, that the board had misapplied the law of conspiracy. According to the troopers, the board erred because it "ignored the undisputed evidence that Trooper Armaganian traveled to the Hampton District Court prepared to testify." According to the troopers, under the "portal to portal rule" regarding overtime compensation, if Trooper Armaganian traveled to the Hampton District Court prepared to testify, then the allegations against him should have been dismissed because he did not receive an unauthorized witness fee. Furthermore, even if there had been a "conspiracy" to obtain unauthorized fees, the conspiracy had been abandoned because Armaganian had traveled to the court to testify, and any subsequent acts undertaken by Trooper Korontjis could not have been in furtherance of the conspiracy.

The PAB affirmed its decision. In addressing the appellant's argument regarding the finding of conspiracy, the PAB stated:

The evidence does not support a finding that Trooper Armaganian "appeared" at the Hampton District Court, nor does it weigh in favor of the Appellant's claim that Trooper Armaganian's appearance at the courthouse terminated or aborted the conspiracy. The Appellants failed to offer any plausible explanation why Trooper Armaganian did not enter the courthouse and sign himself in if, in fact, he had traveled to the Hampton District Court for the purpose of prosecuting his case. Similarly, the Appellants failed to offer a plausible explanation why Trooper Armaganian failed to request reimbursement for travel that day in his personal vehicle, which both parties agreed he would have been entitled to receive if he were entitled to "portal to portal" compensation.

The appellants argued that the Board's decision ignored the testimony of [a number of witnesses] that state troopers required to appear in court on their days off are entitled to overtime compensation from the moment they leave their homes. There is no dispute how compensation is calculated when an officer is entitled to receive such compensation. However, the evidence does not reflect that Trooper Armaganian was entitled to receive any compensation.

Following the denial of their motion for rehearing, the troopers appealed to this court. We accepted the appeal and ordered the PAB to prepare a record within sixty days. The PAB failed to timely file a certified copy of the record, filing it over twenty months late. We therefore requested that the parties brief the issue of whether the prejudice caused by the board's delay in filing a certified copy of the record warrants granting the relief the petitioners seek.

The troopers argue on appeal that: (1) the board's decision was unjust and unreasonable because the board incorrectly applied the law of conspiracy to determine that the appellant's conduct warranted the discipline imposed by the division of State police; (2) the PAB erred as a matter of law in admitting into evidence the result of polygraph examinations; and (3) the court should vacate the PAB's decision because of the PAB's lengthy delay in preparing the record in this case. Because we agree, for the reasons that follow, that the board's decision that the troopers had conspired to obtain an unauthorized witness fee was unjust and unreasonable, we do not reach the troopers' remaining arguments.

This is an appeal from a final decision of the New Hampshire Personnel Appeals Board pursuant to RSA 21-I:58, 11, RSA 541:6 and New Hampshire Supreme Court Rule 10. We will therefore affirm the decision unless we are satisfied, by a clear

preponderance of the evidence before us, that the order is unjust or unreasonable. See RSA 541:13 (1997); Appeal of Boulay, 142 N.H. 626, 627-28 (1998).

While we recognize that what is at issue here is not an action for civil conspiracy, but rather a personnel decision made by the division of State police, existing conspiracy law, and the principles underlying it, inform our judgment about whether the PAB's decision in this case was unjust or unreasonable. "The gist of a civil action for conspiracy is not conspiracy as such, without more, but the damage caused by the acts committed pursuant to the formed conspiracy. There must be something done pursuant to the conspiracy which harms the plaintiff." Gov. Grove Condo. Ass'n v. Hill Dev. Corp., 414 A.2d 1177, ¶182 (Conn. Super. 1980) (citations omitted); see also Durant Software v. Herman, 257 Cal. Rptr. 200, 206 (Cal. Ct. App. 1989). Thus, under New Hampshire law, the elements of a civil conspiracy are: "(1) two or more persons . . .; (2) an object to be accomplished (i.e., an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987). A conspirator may avoid liability for the conspiracy by withdrawing from, or abandoning the conspiracy. Cf. 16 Am. Jur. 2d Conspiracy § 26 (1983) (where an overt act is required for a criminal conviction, a conspirator may avoid guilt by withdrawing from the conspiracy prior to the commission of the overt act).

As noted above, the PAB was presented with conflicting evidence about the contents of the January 19, 1995 telephone conversation between troopers Korontjis and Armaganian. According to the troopers, they discussed Korontjis' handling the case, and agreed that Korontjis would try to resolve the case by plea and would call Armaganian back with the result. The troopers denied that they discussed Korontjis' signing Armaganian in at the courthouse. Trooper Winters, by contrast, testified that she heard Korontjis tell Armaganian, "Don't worry about that. I'll just sign your name in." Although the troopers attempted to discredit Winters at the hearing, the PAB found Trooper Winters' testimony credible, a finding we will not disturb. See Bailey v. Musumeci, 134 N.H. 280, 286 (1991) (as the fact finder, the trial court has the discretion to credit or not credit the testimony of witnesses before it). Nevertheless, simply finding that her testimony was credible, that Korontjis entered Armaganian's name onto the Hampton District Court witness list and that he later completed the off-duty certification of court appearance form for Armaganian is not enough to support the conclusion that the troopers conspired to obtain an unauthorized witness fee.

The troopers offered uncontroverted testimony at the hearing that under the "portal to portal" rule a trooper who is off-duty and has to appear in court is paid the contractual minimum for his appearance even if the case is resolved before the trooper reaches the courthouse or even if the trooper is informed on his or her way to the courthouse that the case will not proceed. While the board is not required to believe

even uncontroverted evidence, see In re Buttrick, 134 N.H. 675, 676 (1991), the board did not specifically find that a trooper is not entitled to the minimum overtime compensation if he travels to court with the intention of resolving a case. Nor has the State denied, either below or on appeal, that a trooper who is off-duty and has to appear in court is entitled to overtime compensation from the moment he drives to the courthouse with the intention of appearing in court. Therefore, we assume, for the purposes of this appeal, that the board found that the "portal to portal" rule does exist, and is applicable in this case.

Given the existence of the "portal to portal" rule, we now consider whether, in order to find that the troopers conspired to obtain an unauthorized witness fee, the PAB was required to first find that Armaganian did not travel to Hampton District Court on the morning of January 19, 1995, to prosecute the case.

The PAB concluded that the State had proven that Korontjjs and Armaganian had agreed that Korontjjs would sign Armaganian's name to the list of court witnesses at a time when both men knew that Armaganian had no intention of appearing in court. The PAB also concluded that the "overt acts" in furtherance of the agreement occurred when Korontjjs entered Armaganian's name onto the Hampton District Court witness list, and later completed the off-duty certification of court appearance form for Armaganian. Unless the board rejected the troopers' uncontroverted testimony that Armaganian drove to the courthouse that morning prepared to prosecute the case, Armaganian would have been entitled to overtime compensation under the "portal to portal" rule. Under these circumstances, Korontjjs' subsequent acts of entering Armaganian's name on the witness list and completing the certification of court appearance forms would have been innocent acts, rather than acts in furtherance of an unlawful agreement. A finding that Armaganian went to the courthouse prepared to testify would therefore compel the conclusion either that there was no conspiracy, or that the conspiracy had been abandoned as soon as Armaganian left his home en route to court, prior to the commission of the alleged overt acts. See Jay Edwards, 130 N.H. at 47; 16 Am. Jur. 2d Conspiracy § 26 (1983). Therefore, an explicit finding that Armaganian did not travel to court prepared to testify is critical to a finding of conspiracy to obtain unauthorized witness fees.

We disagree with the dissent's assertion that the record contains an explicit finding that Armaganian did not travel to the court prepared to testify. In response to the Troopers' motion for rehearing, the PAB stated that "the evidence does not support a finding that Trooper Armaganian 'appeared' at the Hampton District Court." A finding that Trooper Armaganian did not "appear" is not equivalent to a finding that Trooper Armaganian did not travel to Hampton District Court prepared to testify. Under the portal to portal rule, Armaganian would be eligible for overtime compensation if he drove to the courthouse with the intention of appearing in court, whether or not he entered the courthouse.

In light of this analysis, we conclude that the board erred in finding that a conspiracy existed without also explicitly rejecting the troopers' testimony that Trooper Armaganian went to the Hampton District Court prepared to prosecute the case, and therefore hold that the PAB's decision was unjust and unreasonable. Ordinarily, such a holding would result in remand to the agency. See, e.g., Foote v. State Personnel Comm'n, 116 N.H. 144, 148 (1976). However, we conclude, for the reasons that follow, that remand to the PAB would be inappropriate in this case.

The events giving rise to the disciplinary action at issue in this case occurred on January 19, 1995. Following the imposition of major discipline, the Troopers appealed to the PAB, which held a hearing in September and October 1995. On January 31, 1997, the PAB affirmed the Division's finding that the Troopers had conspired to obtain Armaganian a witness fee even though he did not go to court. The Troopers filed a motion for a rehearing. On October 15, 1998, the PAB issued an order denying the motion for rehearing, and the troopers appealed to this court.

We accepted this appeal on January 29, 1999, and ordered the PAB to prepare a record within sixty days. When the PAB failed to do so we ordered that the State show cause why the relief sought in the appeal should not be granted for failure of the board to file the certified copy of the record. The PAB finally forwarded a record of the proceedings to this court on December 4, 2000.

Largely due to the PAB's delays, both in responding to the troopers' motion for rehearing and in filing the record with this court, reconsideration of the case on remand would occur more than six years after the events that gave rise to the disciplinary action at issue. Given the nature of our decision today, the delays therefore preclude the PAB both from reconsidering its opinion without holding a rehearing, and from holding a rehearing. We have held that the decision in this case was unjust and unreasonable because the PAB failed to specifically find that Armaganian did not travel to the courthouse on January 19, 1995 prepared to testify. Armaganian and Korontjis were the only witnesses who offered direct evidence on that issue. Therefore, the PAB's factual finding would turn on whether it found the troopers' testimony credible. Because six years will have passed since the troopers testified and because a transcript provides no indication of a witness' tone or demeanor, "two useful tools in the assessment of credibility," State v. Giles, 140 N.H. 714, 719 (1996), the PAB may not rely on the record alone in revisiting this issue. Furthermore, because memories of the events of January 19, 1995 have likely faded, and witnesses may now be unavailable, we conclude that the length of the delay has substantially prejudiced the troopers, and precludes the possibility of a rehearing. Under these circumstances, remand to the agency would serve no purpose.

Reversed.

BRODERICK and DALIANIS, JJ., concurred; DUGGAN, J., with whom NADEAU, J., joined, dissented..

DUGGAN, J., dissenting. The New Hampshire Division of State Police charged State Troopers Mark Armaganian and Theodore Korontjis with conspiring to obtain an unauthorized court witness fee for Trooper Armaganian. After an internal investigation and a full evidentiary hearing, the division of State police found the troopers guilty of a major disciplinary infraction and imposed an eleven day suspension. Both troopers appealed to the Personnel Appeals Board (PAB). After a two day de novo evidentiary hearing at which twelve witnesses testified, the PAB determined that the troopers conspired to obtain an unauthorized witness fee for Trooper Armaganian and that the discipline imposed by the division of State police was "an appropriate sanction in light of [the] nature of the offense."

Because this matter has already been reviewed by both the division of State police and the PAB, our appellate review is narrowly defined by RSA 541:13 (1997):

[All] findings of the commission upon all questions of fact properly before it shall be deemed prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of evidence before it, that such order is unjust or unreasonable.

(Emphasis added.)

The majority explains that under the "portal to portal" rule, Trooper Armaganian would have been entitled to overtime compensation if he drove to the courthouse on January 19, 1995 prepared to prosecute the case. Thus, the majority concludes that the PAB's decision was unjust and unreasonable because it failed to "explicitly" reject the troopers' testimony that Trooper Armaganian traveled to the courthouse to prosecute the case. This conclusion is erroneous because the record in this case does in fact contain an explicit finding that Trooper Armaganian did not drive to Hampton District Court on the morning of January 19, 1995.

In their motion for rehearing filed with the PAB, the troopers argued that the PAB's decision was "in error because it ignores the undisputed evidence that Trooper Armaganian traveled to Hampton District Court prepared to testify." In denying the motion for rehearing, the PAB explained:

The evidence does not support a finding that Trooper Armaganian "appeared" at the Hampton District Court, nor does it weigh in favor of the Appellants' claim that Trooper Armaganian's appearance at the courthouse terminated or aborted the conspiracy. The Appellants failed to offer any

plausible explanation why Trooper Armaganian did not enter the courthouse and sign himself in if, in fact, he had traveled to the Hampton District Court for the purpose of prosecuting his case. Similarly, the Appellants failed to offer a plausible explanation why Trooper Armaganian failed to request reimbursement for travel that day in his personal vehicle, which both parties agreed he would have been entitled to receive if he were entitled to "portal to portal" compensation.

By finding that "[t]he evidence does not support a finding that Trooper Armaganian 'appeared' at the Hampton District Court," the PAB explicitly rejected Trooper Armaganian's testimony that he traveled to Hampton District Court on January 19, 1995. Any doubt as to the meaning of this finding is clarified by the PAB's statement that it lacked "any plausible explanation why Trooper Armaganian did not enter the courthouse and sign himself in if, in fact, he had traveled to Hampton for the purpose of prosecuting his case" and that it further lacked "a plausible explanation why Trooper Armaganian failed to request reimbursement for travel that day in his personal vehicle, which both parties agreed he would have been entitled to receive . . ." Clearly, the Board concluded that the troopers' version of the events was unconvincing and relied on this lack of credibility to conclude that Trooper Armaganian did not travel to the Hampton District Court on January 19, 1995.

The PAB's factual findings are presumed to be lawful and reasonable. Appeal of Booker, 139 N.H. 337, 339-40 (1995). The majority's disregard of the PAB's finding is inconsistent with the standard of review set forth in RSA 541:13, which requires findings of the PAB to be deemed prima facie lawful and reasonable. In reviewing the PAB's decision, this court may therefore reverse *only* if it is satisfied "by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." RSA 541:13.

Here, there is no evidence that the PAB's decision is unjust or unreasonable because there is considerable evidence to support the PAB's finding that Trooper Armaganian did not travel to the Hampton District Court on January 19, 1995. First, as the majority acknowledges, Trooper Winter credibly testified regarding her conversation with Trooper Korontjis and the conversation that she overheard between Trooper Korontjis and Trooper Armaganian. This evidence strongly suggested that Trooper Korontjis was going to handle Trooper Armaganian's case in Hampton District Court while Trooper Armaganian stayed home. Second, the court security officer testified that "he normally can verify that those persons whose name appear on the witness lists were actually present in court on the date(s) specified . . . [and] he was certain he had not seen Trooper Armaganian in the courthouse that day." Third, the court security officer testified that the clerk of court told him that he "had also not seen Trooper Armaganian in or around the court that day." Finally, the PAB's decision is supported by the fact that, somewhat conveniently, the only person who could corroborate Trooper

Armaganian's claim that he traveled to the courthouse parking lot was Trooper Korontjis.

Our sole task on appeal is to review the record and determine whether competent evidence supports the PAB's decision. Because there is competent evidence in the record to support the PAB's factual findings, we are statutorily required to defer to the PAB's decision. Appeal of Martino, 138 N.H. 612, 614 (1994). As the troopers have failed to satisfy their burden of proving by a clear preponderance of the evidence that the PAB's decision was either unjust or unreasonable, I respectfully dissent.

NADEAU, J., joins in the dissent.

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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November 8, 2001

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Re: 98-710, Appeal of Mark Armağanian & a. (Corrected opinion handdown date)

The court will release an opinion in the above case on November 13, 2001. A copy will be mailed to you on that date. You may pick up a copy at the clerk's office anytime after 8:30 a.m. on the release date. The opinion will also be available to you by 9:00 a.m. through the New Hampshire Supreme Court's home page on the Internet. The address is as follows:

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You may also call the clerk's office on the release date to find out the result. The office staff, however, has been instructed to give by telephone only the mandate of the court (i.e., affirmed, reversed, dismissed, etc.). The office staff will not be available to read the opinion to you on the telephone or to discuss the theories of the decision.

Very truly yours,

A handwritten signature in cursive script that reads "Loretta S. Platt".

Loretta S. Platt

LSP/drc

cc: NH Personnel Appeals Board 96-D-3, 4
Attorney General
File

State of New Hampshire



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APPEALS OF:

MARK C. ARMAGANIAN - Docket #96-D-3

and

THEODORE KORONTJIS - Docket #96-D-4

Division of State Police

Response to Appellants' Motion for Rehearing and State's Objection to Motion

October 15, 1998

By letter dated February 20, 1997, Attorney James Donchess filed Appellants' Motion for Rehearing in the above-titled appeal. The State's Objection to that Motion was received on February 26, 1997.

A properly filed Motion for Rehearing must set forth fully every ground upon which it is claimed that, on the facts in evidence, the decision or order complained of is unlawful or unreasonable; or it must provide additional evidence that was not available at the time of hearing. Having considered the parties' arguments, the Board voted unanimously to deny the Motion. In so doing, the Board found the following:

1. The Appellants failed to show good cause why the Board should accept the statements of Trooper Twyon for the purpose of impeaching the credibility of Trooper Winters' testimony, or for the purpose of justifying a rehearing on the merits of the appeal.

The Appellants failed to provide any reason why such testimony could not have been offered at the hearing on the merits. Furthermore, if that testimony were used to impeach that testimony, it would

also hold true for it appears that the proffered, after-the-fact testimony is being offered as that of an expert witness. The State had neither the opportunity to challenge Trooper Twyon's expertise on the subject, nor to offer the testimony of its own expert, if warranted. The Appellants' failure to offer this evidence at the hearing on the merits does not provide "good cause" for a rehearing on the merits of the appeal.

2. The decision is neither unlawful nor unreasonable.

Contrary to the Appellants' arguments, the Board's application of the law of conspiracy is not in error. There is sufficient evidence of a conspiracy, and of acts in furtherance of that conspiracy, to warrant a finding in the State's favor.

The evidence reflects that Trooper Korontjis had agreed to sign Trooper Armaganian's name to the list of court witnesses at a time when both men knew that Trooper Armaganian had no intention of appearing in court. Although both men knew that Trooper Armaganian had never entered the courthouse, Trooper Korontjis did, in fact, sign Trooper Armaganian's name to the list as if he had appeared in court, and later, at Trooper Armaganian's request, completed and signed Trooper Armaganian's name to a certification of off-duty court appearance for submission with Trooper Armaganian's weekly report of hours worked.

The Appellants argued that the decision "ignores the undisputed evidence that Trooper Armaganian traveled to the Hampton District Court prepared to testify," thereby aborting or terminating the "alleged conspiracy." They argued that having done so, Trooper Armaganian was entitled to compensation under the "portal to portal" overtime provisions, and that "any subsequent acts undertaken by Trooper Korontjis could not have been in furtherance of a nonexistent and aborted alleged conspiracy." They also argued that the Board's decision was in error because it made no finding with respect to Trooper Armaganian's entitlement to "paid overtime for his travel and appearance at the Hampton District Court."

The Appellants point to the testimony of Lt. Colin Forbes that a trooper would be entitled to receive a witness fee if he made tentative arrangements for another officer to dispose of a case, but later, having received no confirmation that the case was settled, went to court to handle the matter himself only to discover that the other trooper had settled the case. That testimony, however, was given in response to a hypothetical situation posed by the Appellants which omitted the critical factor central to this case. Although neither officer expected Trooper Armaganian to appear in court, they agreed to have Trooper Korontjis enter Trooper Armaganian's name in the court records in order to make it appear that Trooper Armaganian was actually present in court that day.

The evidence does not support a finding that Trooper Armaganian "appeared" at the Hampton District Court, nor does it weigh in favor of the Appellants' claim that Trooper Armaganian's appearance at the courthouse terminated or aborted the conspiracy. The Appellants failed to offer any plausible explanation why Trooper Armaganian did not enter the courthouse and sign himself in if, in fact, he had traveled to the Hampton District Court for the purpose of prosecuting his case. Similarly, the Appellants failed to offer a plausible explanation why Trooper Armaganian failed to request reimbursement for travel that day in his personal vehicle, which both parties agreed he would have been entitled to receive if he were entitled to "portal to portal" compensation.

The Appellants argued that if Trooper Armaganian was entitled to overtime compensation, then the allegations against the Appellants, "...must be dismissed because [Trooper Armaganian] did not receive an 'unauthorized witness fee.'" The Board did not find that Trooper Armaganian was entitled to overtime compensation. The Board's use of the term "witness fee" rather than "portal to portal" or "overtime" does not alter the underlying finding that Troopers Armaganian and Korontjis conspired to obtain compensation for Trooper Armaganian to which he was not entitled.

The Appellants argued that the Board's decision ignored the testimony of Cpl. Copponi, Cpl. Lalacheur, Tr. Blonigan, Tr. Palmer and Tr. Thibodeau that state troopers required to appear in court on their days off are entitled to overtime compensation from the moment they leave their homes. There is no dispute how compensation is calculated when an officer is entitled to receive such

compensation. However, the evidence does not reflect that Trooper Armaganian was entitled to receive any compensation.

The Appellants also argued that the Board ignored testimony that, "...it was not uncommon for one trooper to write another trooper's name on a witness log when the other trooper is at court." Being in the parking lot at a courthouse offers no more proof of being "at court" than being in the parking lot of a movie theater proves that one was "at the movies." Furthermore, the officers testified that none of them had, or would have, allowed another trooper to sign their names to a witness list or certification of off-duty court appearance if they were not actually present in the court. Their testimony that it was "not uncommon" to be signed-in by someone else referred to those situations when officers appearing as witnesses might be signed in by designated prosecuting officer. In this case, Trooper Armaganian was to have been the prosecutor.

The Appellants argued that the Board's decision was in error because it, "relie[d] entirely upon the testimony of Trooper Debra Winters for the evidence of the alleged conspiracy," and ignored the "undisputed testimony" of Troopers Armaganian and Korontjis about the substance of their conversation, and their subsequent attempts to communicate by phone. They also argued that the Board ignored the "admitted hostility" between Trooper Winters' husband, Cpl. Winters, which should have been considered in weighing that evidence. The evidence reflects that neither Trooper Winters nor her husband Cpl. Winters reported their suspicions to their supervisors, although both had ample opportunity to do so before the investigation commenced. Even after the start of the investigation, neither officer volunteered information about the incident until questioned by investigators.

The Appellants argued that the Board's decision to allow polygraph evidence into the record was prejudicial and in error, and that they believed that absent such evidence, the Board would not have "relied entirely upon Trooper Winters' precise recollection of a telephone conversation she inadvertently overheard..." The Board did not consider the polygraph examinations to be credible evidence, and did not weigh Trooper Winters' testimony in light of the polygraph. Further, the Board did not rely entirely upon Trooper Winters' testimony in determining that the Appellants

conspired to obtain unauthorized compensation for Trooper Annaganian. The totality of the evidence weighed in favor of the State's allegations and subsequent decision to discipline the Appellants.

For the reasons set forth above, and those contained in the State's Objection, the Board voted to deny Appellants' Motion for Rehearing.

FOR THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Atty. Sheri J. Kelloway-Martin, Litigation Office, Department of Safety, 10 Hazen Dr.,
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State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEALS OF:

MARK C. ARMAGANIAN

Docket #96-D-3

and

THEODORE KORONTJIS

Docket #96-D-4

New Hampshire Division of State Police

January 31, 1997

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Barry) met on September 18, 1996, and October 30, 1996, under the authority of NH RSA 21-I:58, to hear the appeals of Mark Armaganian and Theodore Korontjis, employees of the New Hampshire Department of Safety, Division of State Police. The appellants, who were represented at the hearing by Attorney James W. Donchess, were appealing eleven day suspensions without pay, effective August 7, 1995, on charges that they had conspired to obtain an unauthorized court witness fee for Trooper Armaganian in violation of the Division of State Police Professional Standards of Conduct. Attorney Sherri J. Kelloway-Martin appeared on behalf of the Division of State Police.

The following persons gave sworn testimony at the hearing:

State Police Cpl. Louis Copponi
State Police Tr. Debra Winters
State Police Cpl. Charles Winters
Richard A. Ballou
Former State Police Col. Lynn Presby
State Police Sgt. Clayton Young

State Police-Tr. Mark C. Armaganian
State Police Tr. Theodore Korontjis
State Police Cpl. John Lalacheur
State Police Tr. Robert Blonigan
State Police Tr. Mark Thibedault
State Police Tr. Patrick Palmer

The following exhibits were entered into evidence:

- State's 1: Professional Standards of Conduct (Div. Of State Police)
- State's 2: Witness Attendance Form
- State's 3: February 1, 1995 Memorandum from Mark Armaganian to Lt. Colon Forbes
- State's 4: February 23, 1995 memorandum from Theodore Korontjis to Lt. Colon Forbes
- State's 5: 1.4.0 Duties and Responsibilities (from State Police Manual)
- State's 6: August 5, 1995 Final Disciplinary Hearing Report on Mark Armaganian
- State's 7: August 7, 1995 Notice of Suspension Without Pay - Mark Armaganian
- State's 8: August 8, 1995 Final Disciplinary Hearing Report on Theodore Korontjis
- State's 9: August 7, 1995 Notice of Suspension Without Pay - Theodore Korontjis
- State's 10: 42B - Polygraph Unit and Procedures
- State's 11: Report of Clayton Young to Capt. Foote re: Korontjis polygraph
- State's 12: Report of Clayton Young to Capt. Foote re: Armaganian polygraph

- Appellant's A: Certification of Off-Duty Court/Hearing Attendance
- Appellant's B: Weekly Duty Report - Mark Armaganian
- Appellant's C: 6/94 Performance Evaluation (Armaganian)
- Appellant's D: 6/93 Performance Evaluation (Armaganian)
- Appellant's E: 6/92 Performance Evaluation (Armaganian)
- Appellant's F: 6/94 Performance Evaluation (Korontjis)
- Appellant's G: 5/9/94 Press Release re: Theodore Korontjis (w/attachments)
- Appellant's H: 10 Letters of Appreciation to M. Armaganian
- Appellant's I: 6/28/95 Report from Capt. Foote to Col. Presby
- Appellant's J: Truth and Deception (excerpts)
- Appellant's K: DSSP 152/rev' 87 on Polygraphs

At the close of the hearing, Ms. Kelloway-Martin submitted the State's Proposed Findings of Fact and Rulings of Law. Mr. Donchess requested leave to file the Appellant's Requests at a later date. In the absence of an objection from the State, the Board allowed the appellants until November 4, 1996, to submit their requests. To the extent that the parties' proposed findings of fact and rulings of law are consistent with the decision below, they are granted.

Otherwise, they are denied. They are sufficiently numerous that the Board has determined that it will not rule on them individually.

Several facts are not in dispute:

1. Trooper Mark Armaganian was scheduled to appear in Hampton District Court on the morning of January 19, 1995, to prosecute a speeding case.
2. At that time, there was no prosecutor assigned to Troop A, and officers were responsible for prosecuting their own cases.
3. Trooper Armaganian was off-duty on January 19, 1995, and hoped to find another trooper to settle the case for him, thereby eliminating the need for him to go to court on his day off.
4. Trooper Theodore Korontjis, who was on duty on January 19, 1995, spoke with Trooper Armaganian by telephone and agreed to handle his speeding case for him.
5. While he was at Hampton District Court on January 19, 1995, Trooper Korontjis entered Trooper Armaganian's name on the court witness list, although he had already settled Trooper Armaganian's case and knew that Trooper Armaganian had not been in the courtroom that day.
6. At Trooper Armaganian's request, Trooper Korontjis completed and signed Trooper Armaganian's name to a certification of off-duty court hearing appearance indicating that Trooper Armaganian was entitled to a witness fee for the case which Trooper Korontjis had settled.
7. Trooper Armaganian completed a weekly duty report indicating that he was entitled to a witness fee for one half day on January 19, 1995, while he was off-duty, in connection with the disposition of a case in Hampton District Court.
8. The Division of State Police conducted an internal investigation to determine if Troopers Mark Armaganian and Theodore Korontjis had conspired to obtain an unauthorized witness fee for Mark Armaganian.
9. Troopers Armaganian and Korontjis were required to submit to polygraph examinations in connection with the internal investigation.

10. Following "final disciplinary hearings," Col. Lynn M. Presby notified both troopers by letters dated August 7, 1995, that they were to be suspended without pay for eleven days on charges that they "...conspired with [one another] to obtain an unauthorized court witness fee [for Trooper Armaganian] when both Trooper Armaganian and Trooper Korontjis knew that Trooper Armaganian was not in attendance in court." (State's Exhibits 7 and 9).
11. Under Division of State Police Rules and Regulations, a suspension in excess of ten days is considered major discipline, making both troopers ineligible for promotion for a period of seven years. Both troopers also were transferred out of Troop A.

Trooper Debra Winters testified that on the morning of January 19, 1995, just before 8:00 a.m. at the Troop A barracks, Trooper Korontjis asked her if she had any cases scheduled that day in Hampton District Court. When she replied that she did not, he informed her that he needed to call the court to see if one of his own cases had been continued. He also commented that he had to be at Hampton District Court to "...take care of something for Mark because he was too [f---ing] lazy to get out of bed." Ms. Winters testified that a short time later, the dispatcher called down to the troopers' room to say that Trooper Armaganian was on the phone, or that Trooper Korontjis should telephone Trooper Armaganian. Although she was unsure who initiated the call, she was present during the ensuing telephone conversation between Troopers Armaganian and Korontjis. Trooper Winters testified that she overheard Trooper Korontjis say, "Don't worry about it, brother, I'll just take care of you," and "I'll take care of it." She testified that later in that same conversation, she heard Trooper Korontjis tell Trooper Armaganian, "Don't worry about it. I'll just sign your name in."

Trooper Winters testified that she was sufficiently concerned by what she had overheard that she repeated Trooper Korontjis' remarks to her husband Cpl. Charles Winters that evening when she returned home. She believed Trooper Korontjis had agreed to put Mark Armaganian's name on the court witness list even though he knew that Trooper Armaganian

did not intend to be in court that day. When Trooper Winters asked her husband if he had seen Trooper Armaganian at the courthouse that morning, he replied that he had not.

Cpl. Charles Winters, who was a trooper at the time of the incident, testified that after he told his wife that he had not seen Trooper Armaganian at the courthouse, she said she suspected that the appellants were stealing from the court. She described her original conversation with Trooper Korontjis, and those portions of the telephone conversation that she had overheard. Cpl. Winters thought it was possible that Trooper Armaganian might have forgotten to sign himself in on a prior visit to the courthouse, and that Trooper Korontjis was simply agreeing to put his name on the witness list for a day when he actually had been in court. He told his wife he would check the witness lists at Hampton District Court the following morning when he was there for arraignments.

Cpl. Winters testified that after arriving at Hampton District Court the following morning, he went to the clerk's office asking to see the witness lists for January 19th. John Clark, the Clerk of Court, told him, "You're looking to see if Mark Armaganian was here. Dick already came in to look." Trooper Winters testified that he thought the clerk meant that Sgt. Dick Burrows, his shift supervisor, had been in to look at the list. He testified that it wasn't until the following Monday or Tuesday that he discovered that John Clark was actually referring to Dick Ballou, the Court Security Officer.

Until questioned by State Police Sgt. Gates during the ensuing investigation, neither Debra nor Charles Winters mentioned the January 19th incident to their supervisors. Debra Winters testified that she did not volunteer information to her supervisors about the telephone conversation between Troopers Armaganian and Korontjis because she believed that there would be "serious repercussions," and she did not want it to appear that she was trying to get anyone in trouble. Charles Winters testified that once he knew the incident was under investigation, he believed he had no further responsibility to inform his superiors in the chain of command. He also testified that after learning that investigators were aware that he had

asked to look at the January 19th witness lists, he assumed that investigators would eventually want to question him about the incident.

Richard Ballou testified that as Court Security Officer for the Hampton District Court, he certifies witness lists before forwarding them Department of Justice for payment of witness fees. He testified that he normally can verify that those persons whose names appear on the witness lists were actually present in court on the date(s) specified. However, when Mr. Ballou reviewed the witness lists for January 19, 1995, he discovered Trooper Armaganian's name, although he was certain he had not seen Trooper Armaganian in the courthouse that day. He testified that he then spoke with his own supervisor John Clark, Clerk of the Court, who told Mr. Ballou that he also had not seen Trooper Armaganian in or around the court that day. Mr. Ballou testified that he had no further discussion about the issue with anyone until some three or four months later when he was called to speak with State Police Sergeant Gates.

The appellants argued that during their phone conversation, they did not discuss signing Mark Armaganian in at the Hampton District Court. The appellants asserted that Trooper Armaganian was expecting a return call from Trooper Korontjis on the status of his speeding case, and that he became increasingly nervous about the disposition of that case as the time approached for court to convene. They argued that Trooper Armaganian dressed in appropriate civilian clothing for a court appearance and drove his personal vehicle to the courthouse planning to handle his own case if it became necessary. They argued that Trooper Armaganian knew that he could be disciplined for failing to prosecute the case if Trooper Korontjis had been unable to resolve the matter. They asserted that he took his personal vehicle because he was planning to run personal errands when he left the courthouse.

The appellants asserted that when Trooper Armaganian arrived at the courthouse, Trooper Korontjis was in the parking lot retrieving a file from his car. They contended that once

Trooper Korontjis had informed Trooper Armaganian that his case had been settled without the need of a trial, Trooper Armaganian asked Trooper Korontjis to sign him in. They argued that because Trooper Armaganian went to the courthouse prepared to testify, even though Trooper Korontjis had already settled Trooper Armaganian's case, Trooper Armaganian was entitled to the witness fee, or a minimum of three hours of premium pay under the "portal to portal rule."

The appellants argued that in order to prove that they had conspired to obtain an unauthorized witness fee, the State first had to prove that Mark Armaganian did not drive to the Hampton District Court on the morning of January 19, 1995, prepared to prosecute his own case. The Board does not agree. Simply finding that Mark Armaganian drove to the courthouse on the morning in question does not necessarily negate the State's allegations.

A conspiracy exists when there is an agreement by two or more persons to commit a wrongful or unlawful act, and one or more of those persons commits a deed in furtherance of their agreement. In order to demonstrate that the appellants conspired to obtain an unauthorized witness fee, there must be evidence that Troopers Armaganian and Korontjis agreed to have Theodore Korontjis enter Mark Armaganian's name on the witness list at Hampton District Court when both troopers knew that Mark Armaganian did not intend to appear for court that day. The Board found that there was sufficient, credible evidence' of such an agreement to support the State's allegation of a conspiracy. The requisite acts in furtherance of the agreement occurred when Trooper Korontjis entered Trooper Armaganian's name onto the Hampton District Court Witness List, and when he later completed the off-duty certification of court appearance form for Trooper Armaganian.

On the evidence, the Board voted to deny both Trooper Armaganian's and Trooper Korontjis' appeals, finding that they did conspire to obtain an unauthorized witness fee for

¹ The Board did not treat the polygraph examinations as credible evidence for the purposes of determining what may or may not have transpired during the telephone conversation that Trooper Winters overheard between Troopers Korontjis and Armaganian. Accordingly, the Board gave no weight to the results of those examinations in deciding the instant appeal.

Trooper Armaganian. Although the evidence reflects that this conduct was out of character for both appellants, the weight of the evidence supports the State's allegations. Furthermore, contrary to the appellants' proposed findings of fact, Lt. Forbes did not "verify that under the facts of this case, Trooper Armaganian would be entitled to be paid under the portal to portal rule." Lt. Forbes' testimony related to a hypothetical situation in which there was no prior agreement to document eligibility for a court witness fee for a trooper who had no intention of appearing for court.

The Board found Trooper Winters' testimony to be credible evidence of the conspiracy. Except for what she discussed with her husband, Trooper Winters did not disclose any information about the telephone conversation between Troopers Korontjis and Armaganian until she was questioned during the internal investigation. The appellants failed to offer any reasonable explanation how Trooper Winters might have misunderstood what she overheard, or why she might misrepresent what she overheard.

Although the discipline imposed in this instance was substantial, the Board found that it was an appropriate sanction in light of nature of the offense. The Board found that imposition of an eleven day suspension without pay, and the resulting loss of eligibility for promotion, constituted a permissible exercise of managerial discretion within the limitations of the Rules and Regulations of the Division of State Police.

By way of comment, the Board recommends that the Division of State Police develop improved management procedures to monitor the scheduling of court appearances and the coverage of those appearances by the troopers involved in the pertinent criminal cases. Under the current system, it appears that a trooper could intentionally schedule arraignments or trials on off-duty days as a means of obtaining additional income in the form of witness fees. It also appears that without any prior supervisory approval, a trooper can arrange for a fellow officer to dispose of one of his or her cases, even when personal convenience is the only reason behind such an arrangement. While we assume that most troopers usually

schedule their cases effectively and responsibly, there is no evidence in this case to suggest that any formal policy, procedure or mechanism for overseeing this system is in place.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Sheri J. Kelloway-Martin, Esq.
James W. Donchess, Esq.

State of New Hampshire



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Appeal of Mark C. Armaganian - Docket #96 -D-3

Appeal of Theodore Korontjis - Docket #96-D-4

Division of State Police

April 5, 1996

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, March 20, 1996, under the authority of RSA 21-I:58, to hear oral argument on Appellant's Motion to Exclude Results of Polygraph Examinations. James Donchess, Esq., appeared on behalf of the appellants. Sheri J. Kelloway-Martin, Esq., appeared on behalf of the Department of Safety, Division of State Police.

Attorney Donchess argued that polygraph examinations are inherently unreliable and that, as a matter of practice, the Board should consider polygraph evidence inadmissible. Mr. Donchess described the polygraph examination process as "dehumanizing," noting that in the pre-examination phase of the session, subjects may be required to answer highly personal, irrelevant questions such as, "Between the ages of 20 and 29, have you ever lied to a person in a position of authority?" or, "Have you ever had a sexual experience which embarrassed you?"

Attorney Donchess argued that one of the questions posed to Trooper Armaganian was a compound question for which there was no "truthful" answer. He asserted that if the question had been broken into its component parts, a truthful response would have required three different answers: "Yes," "No," and "Can't really say." By simply answering, "No," Trooper Armaganian was considered "deceptive."

Attorney Donchess asserted that when polygraph examinations are used as part of an internal investigation, they are normally viewed as "confirming what we already believe." He argued that in most internal investigations utilizing a polygraph, the test has been requested and commissioned because the employer believes the employee is being deceptive. The examiner is simply confirming what the employer believes to be true. He concluded that polygraphs are unreliable, reflecting the pre-disposition of the polygraph examiner. He argued that the use

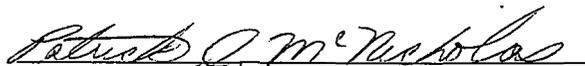
Appeal of Karontjis and Armaganian
Order on Motion to Exclude Results of Polygraph

of polygraphs and their inclusion in the record of administrative proceedings represents poor management practice. He suggested that the Board should adopt the position that polygraphs, whether the results are favorable or unfavorable, are inadmissible.

Ms. Kelloway-Martin argued that there is clear legal authority for police agencies to use polygraphs in internal investigations, and that the Board should allow the results of the polygraph examination to be admitted into the record, giving the evidence the weight to which it is entitled. She also argued that the polygraph examinations of Troopers Karontjis and Armaganian are relevant, credible parts of the State's case, but that the appointing authority had other evidence upon which it relied in deciding to discipline these employees.

Having considered the parties' oral argument and offers of proof in light of the Appellant's Motion and the State's Objection, the Board voted to deny the Appellant's Motion to Exclude Results of Polygraph Examinations. The Board found that the results of the polygraph examination are not per se inadmissible, whatever weight they may have as competent evidence. Accordingly, the Appellant's Motion is denied.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


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