

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

**STATE’S OBJECTION TO MOTION TO DISMISS INDICTMENT FOR CRIMINAL SOLICITATION OF MISUSE OF POSITION (DUPREY)**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to Defendant’s Motion to Dismiss Indictment for Criminal Solicitation of Misuse of Position (Duprey) (“Motion”). In support of this Objection, the State represents as follows:

1. Defendant was indicted by the Merrimack County Grand Jury for, *inter alia*, Criminal Solicitation of Misuse of Position (Charge ID 2257297C).
2. The Motion argues that the indictments should be dismissed because the Pease Development Authority (“PDA”) is not an executive branch agency, and that Duprey is therefore not an executive branch official who can be solicited to violate RSA 21-G:23.

**PDA is an Executive Branch Agency; Duprey Subject is Executive Branch Official**

3. “[T]he concept of a legislatively created entity independent of the executive branch is not at all novel.” *State Emples. Ass’n of N.H. v. State*, 161 N.H. 558, 563 (2011) (quoting *N.H. Retirement Sys. v. Sununu*, 126 N.H. 104, 107 (1985)). However, the issue of whether an agency is independent or executive depends on three factors: (1) the language of the authorizing statutes creating the agency; (2) whether the agency (or its board or trustees) owe a duty to beneficiaries; and (3) whether there is an administrative gloss on the statute established

by the agency's history of functioning independently. *Id.* at 563 (citing *N.H. Retirement Sys.*, 126 N.H. at 108).

*RSA 12-G Shows Legislative Intent that PDA is Executive Branch Agency*

4. The first factor in considering whether an agency is independent of the executive branch is the language of the authorizing statute. In *State Emples. Ass'n of N.H.*, the Court noted that with regard to the Community College System of New Hampshire ("CCSNH"), the first factor (language of authorizing statute) weighed in favor of CCSNH being an independent state agency. *State Emples. Ass'n of N.H.*, 161 N.H. at 563. One of the key points of "evidence of the legislature's intent that CCSNH not be part of the executive branch" was that the creating statute mandated that "CCSNH not be subject to the budget procedure set out in RSA chapter 9." *Id.* at 563-64. The importance of RSA chapter 9 is that the budget process in this chapter applies only to an "**executive** department, commission, board, institution, office, or other agency of the state government, **by whatever name called** . . . ." RSA 9:1 (emphasis added). That is, the "legislature intended RSA 9:1 to apply only to state agencies and other entities within the State's executive branch," and not to independent state agencies. *State Emples. Ass'n of N.H.*, 161 N.H. at 563. Further, being subject to the budget process of RSA chapter 9 indicates that the agency does not operate independently under the "full power" of its board members or trustees. *N.H. Retirement Sys.*, 126 N.H. 108.

5. RSA 12-G:32 states, "The [PDA] shall comply with the requirements of RSA 9:1 through 9:9, relative to the budget." As the legislature intended RSA chapter 9 to apply only to executive branch agencies and not independent agencies, and as RSA chapter 9 applies to the PDA, the legislature clearly intended the PDA to be an executive branch agency and not an independent agency. *State Emples. Ass'n of N.H.*, 161 N.H. at 563.

6. Further evidence of this legislative intent is found in the PDA authorizing statutes, RSA chapter 12-G. Under the statutes creating the PDA, the PDA's board members are required to file a statement of financial interest for executive branch employees. *Compare* RSA 12-G:5 with RSA 15-A. The PDA must also "pay the department of administrative services its portion of indirect costs for centralized business services." RSA 12-G:7-a. The PDA's Division of Ports and Harbors has the power to adopt administrative rules under RSA 541-A. RSA 12-G:42, X-XI.

7. The chief harbormaster, as an employee of the PDA and on behalf of the PDA, exercises the quintessential executive power – the power of "inquiring into and prosecuting all offenses occurring within the chief harbor master's jurisdiction" – and does so "[s]ubject to the supervision of the [Pease Development] authority, the [PDA] executive director, and the division [of ports and harbors] director." RSA 12-G:50, I(i). *See also* RSA 12-G:51 (criminal law enforcement powers, including prosecution powers, of chief harbormaster and deputy chief harbormaster). No entity in the State can exercise this type of prosecutorial power independent of the authority of the executive branch. *See N.H. CONST.* pt. II, art. 41; RSA 7:6.

8. Lastly, a review of the legislative history reflects a legislative intent to form the PDA as an executive state agency. The bill that established the PDA (SB 351-FN) was amended by the House, which was the version signed into law, for the express purpose of making the PDA an executive state agency instead of an independent entity. The bill, as originally adopted by the Senate, established the Authority as "a body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government . . . ." SB 351-FN, Session Year 1990, Senate Journal, p. 236. This original language was similar to the language creating CCSNH as an independent agency. *State Emples. Ass'n of N.H.*, 161 N.H. at 563-64. However, when the bill came to the House, the Commerce Committee recommended

changes to SB 351-FN. “The first important change address[ed] the concern of the Federal Aviation Authority in that it was mandated that the Development Authority be a state agency.” SB 351-FN, Session Year 1990, House Journal, p. 861. The House addressed the Federal Aviation Authorities concerns by removing the language that described the Authority as an entity separate and distinct from the State. The final version of the bill established the Authority as “a body politic and corporate of the state.” The word “state” in the final version took the place of “a distinct legal existence from the state and not constituting a department of state government.” RSA 12-G:3. *C.f.* RSA 204-C:2 (Housing Finance Authority, which is a “component unit of state government” for purposes of RSA 6:44, is a “body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government”). Therefore the legislature specifically intended the PDA to be an executive state agency.

9. Accordingly, the first factor of the executive agency test – the language of the PDA’s authorizing statute (RSA 12-G) – shows PDA is an executive branch agency.

*PDA Board Does Not Have Fiduciary Obligation to Beneficiaries*

10. The second factor in considering whether an agency is independent of the executive branch is whether the board members or trustees owe a fiduciary obligation to beneficiaries. In considering this factor to determine whether the New Hampshire Retirement System was an independent or executive agency, the New Hampshire Supreme Court noted that “the board of trustees owes the System’s members and beneficiaries a fiduciary obligation to manage the System for the benefit of its members and beneficiaries,” whereas “the Governor and Council have a responsibility to a far broader constituency.” *N.H. Retirement Sys.*, 126 N.H. at 109. That is, owing a fiduciary obligation to a limited class of individuals weighs in favor of an agency being independent, whereas owing a general obligation to the State weighs in favor of an

agency being part of the Executive Branch – as the Executive Branch does not serve discrete classes of individuals, but the State generally.

11. The creation of the PDA was in response to “a matter of great concern for the town of Newington, the City of Portsmouth, the seacoast region, and **the state of New Hampshire**” RSA 12-G:1, I (emphasis added). The PDA was created to address issues affecting “the economies, environment, and quality of life of the affected communities, the seacoast region, and **the state.**” RSA 12-G:1, II. To serve these interests, the PDA was authorized to “tak[e] title in the name of the state of New Hampshire . . . to any or all of Pease Air Force Base.” RSA 12-G:1, III. In order to effectuate this purpose, the former New Hampshire state port authority was integrated into the PDA to “allow for faster and more coordinated development of **New Hampshire ports** with the conversion and redevelopment of Pease Air Force Base,” and thus authority over the airport and state ports were merged into the PDA “**for the benefit of the seacoast region and all of the citizens of New Hampshire.**” RSA 12-G:1, IV. RSA 12-G imposes no fiduciary duty upon the members of the PDA board, but rather the PDA “shall at all times act in a manner which is consistent with **the public good.**” RSA 12-G:7, II. PDA has the authority to issue bonds, which “the governor and council may award an unconditional state guarantee of the principal and interest thereon” because of “the **general public benefits**” of projects so financed by the PDA – subject to “such terms and conditions as [the governor and council] may deem appropriate”. RSA 12-G:31, I-II.

12. Accordingly, the second factor of the executive agency test – the duty of the PDA board consistent with the Executive Branch rather than a limited fiduciary duty to beneficiaries – shows PDA is an executive branch agency.

*There is no Administrative Gloss Indicating History of PDA Operating Independently*

13. The third factor is whether there is an administrative gloss indicating a history of PDA operating independently of the Executive Branch. “[W]hen the meaning of a statute is in doubt, the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent.” *N.H. Retirement Sys.*, 126 N.H. at 109. The defendant has not supported his claim with any evidence that the PDA operates independent of the Executive Branch. Rather, there is administrative evidence that the PDA has functioned as a part of the Executive Branch based upon the history of the New Hampshire Department of Justice’s Civil Bureau providing legal counsel to the PDA. *See* RSA 7:8 (Attorney General to give legal advice to state executive agencies).

14. Accordingly, the third factor of the executive agency test – the lack of any evidence suggestion administrative gloss indicating a history of PDA operating independently of the Executive Branch – shows PDA is an executive branch agency.

**Because PDA is an Executive Branch Agency, Motion should be Denied.**

15. Defendant’s Motion is premised upon the assertion that PDA is not an executive branch agency but an independent agency, and therefore Duprey cannot be solicited to violate RSA 21-G:23. However, because the three-factor test for determining whether an agency is independent or belongs to the Executive Branch establishes that PDA is an Executive Branch agency, Duprey is subject to RSA 21-G:21. *See* RSA 21-G:21, II-a (defining “executive branch official” to include persons “who conduct[] business on behalf of . . . [an] executive branch agency, including a volunteer”). Accordingly, Duprey can be solicited to violate RSA 21-G:23, and the Motion should be denied.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny Defendant's Motion to Dismiss Charge ID 2257397C; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: April 14, 2025

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via the Court's e-filing system to counsel of record.

/s/ Joe M. Fincham II  
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