

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Rockingham County James Reams

v.

Attorney General Joseph A. Foster

NO. 217-2013-CV-00653

And

Rockingham County Attorney James Reams

v.

Rockingham County Commissioners

NO. 218-2013-CV-1342

ORDER

Rockingham County Attorney James Reams (“Reams”) has brought a Petition for Declaratory Judgment challenging his suspension by Attorney General Joseph A. Foster from his law enforcement duties as Rockingham County Attorney, and his exclusion from the Rockingham County Attorney Offices by the Rockingham County Commissioners (“Commissioners”). He alleges that the decision to suspend him on November 6, 2013 was illegal, that his continued suspension is unlawful, and seeks that this Court order his reinstatement. For the reasons stated in this Order, the Court finds that Reams’ current suspension is unlawful, and that he must be reinstated as Rockingham County Attorney, and provided access to the County offices. The Court will

stay its order for 30 days from the date on the Clerk's notice of decision, so that the Defendants may appeal. If Defendants file a Motion for Stay in the New Hampshire Supreme Court with their Notice of Appeal, then this stay shall be extended only until the Supreme Court acts upon the Motion to Stay.

I

This case arose on November 6, 2013 when New Hampshire Attorney General Joseph A. Foster sent a letter to Rockingham County Attorney James Reams, stating that:

Pursuant to my authority under NH RSA 7:6, 7:11, and 7:34, and in light of the decision of the Rockingham County Commissioners to bar you from entering the Rockingham County Attorney's Office pending completion of an on-going investigation, I am hereby immediately suspending you from exercising your criminal law enforcement authority as the Rockingham County Attorney.

The Attorney General petitioned the Superior Court to have an Assistant Attorney General appointed to act in place of Reams, and that Petition was granted on an *ex parte* basis by this Court. The Superior Court, acting as a body, eventually granted that Petition.

On November 19, 2013, Reams filed a Complaint challenging his suspension by Attorney General Joseph Foster from his law enforcement duties as Rockingham County Attorney. Reams sought declaratory relief, requesting a finding that the suspension was unlawful and an order that this Court direct reinstatement. A preliminary injunction hearing was scheduled for December 19, 2013.¹ Following the hearing on December 19, 2013, the Court denied relief without prejudice by Order dated December 23, 2013.

¹ A second action against the Commissioners, alleging they had improperly barred him from his office, was brought on December 11, 2013. Rockingham County Attorney James Reams v. Rockingham County

Rockingham County Attorney James Reams v. New Hampshire Attorney General Joseph Foster, Merrimack County Superior Court, No. 218-2013-CV-1221 (Dec. 23, 2013)(Order, McNamara, J.). At the hearing on December 19, 2013, the Attorney General specifically represented that Reams was the target of a criminal investigation. Based upon that representation, the Court held that the Attorney General had the authority to suspend Reams from his prosecutorial duties while the Attorney General investigated whether or not he had engaged in criminal conduct and that due to the compelling public interest in the confidentiality of the investigation, Reams was not entitled to discovery into the Attorney General’s investigation. Id. at 9–11. The parties eventually agreed that a final hearing on the Complaint for Declaratory and Injunctive Relief would be held on April 7, 2014.

On March 11, 2014 the New Hampshire Attorney General and the Rockingham County Commissioners filed a separate civil action, Attorney General Joseph A. Foster and Rockingham County Commissioners v. James Reams, Merrimack County Superior Ct., No. 217-2014-CV-00133 (March 11, 2014) (“Removal Complaint”), seeking that Reams be removed for official misconduct pursuant to RSA 661:9, IV. On March 26, 2014, at a pretrial hearing in this case, the Attorney General stated that the criminal investigation into Reams is complete and no criminal charges have been brought or will be brought against him. Based upon this representation, the Court decided that no evidence would be necessary at the final hearing in this declaratory judgment action brought by Reams to challenge the Attorney General’s suspension.² Rockingham County

Commissioners, Merrimack County Superior Court, No. 218-2013-CV-01342 (Dec. 11, 2013). The actions have been consolidated.

² The Commissioners stated that their basis for exclusion of Reams from the County offices is the Attorney General’s action.

Attorney James Reams v. Attorney General Joseph A. Foster, et al., Merrimack County Superior Ct., Nos. 217-2013-CV-00653 and 218-2013-CV-1342, at 2–3. (April 2, 2014)(Order, McNamara, J.).

The parties do not dispute the relevant facts:

1. Reams is the duly elected Rockingham County Attorney;
2. His term will expire in January 2015;
3. The Attorney General conducted a criminal investigation into Reams’ activities beginning in November 2013, but no criminal charges have or will be brought against Reams; and
4. The Attorney General has filed a complaint alleging specific acts of official misconduct, requesting that the Superior Court exercise its statutory authority pursuant to RSA 661:9, IV to remove Reams from office.³

No request for a preliminary injunction seeking removal of Reams on a temporary basis prior to trial has been made in the Removal Complaint.

II

The principal issue in this case is the Attorney General’s authority to suspend an elected county attorney. The Attorney General asserts that he has the power to suspend a county attorney’s prosecutorial powers based upon his belief that the county attorney has engaged in official misconduct in violation of RSA 661:9, IV. The Court disagrees.

A

The power to remove a county officer is vested in the Superior Court. RSA 661:9, IV. The statute specifically provides that “any officer of a county, including the register

³ See Removal Complaint .

of probate, may be removed by the superior court for official misconduct.” Id. The New Hampshire Supreme Court has held that “official misconduct,” within the meaning of the statute, means something more than ordinary misjudgment. In re Ash, 113 N.H. 583, 586 (1973).

Critically, the Legislature has provided no mechanism for the Attorney General to summarily remove a county attorney pending institution of removal proceedings pursuant to RSA 661. Rather, the Attorney General concedes that if removal of a county officer is sought pursuant to RSA 661:9, IV, the officer is entitled to notice, discovery, and a trial before the Superior Court. (Obj. Mot. Compel Discovery ¶ 5); see also Hillsborough v. Beaulieu, 113 N.H. 69, 70 (1973). Of course, as with any other civil litigant, if the Attorney General believes that irreparable harm will occur if a county official is not removed prior to trial, he may seek a preliminary injunction. But in order to obtain injunctive relief, the Attorney General would need to make a showing of likelihood of success on the merits, irreparable harm if the relief is not granted, that he has no adequate remedy at law, and that the injunction is in the public interest. UniFirst v. City of Nashua, 130 N.H. 11, 14 (1987); N.H. Dep’t of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). As noted above, no petition for preliminary injunctive relief has been filed in the Removal Complaint.

B

The Attorney General asserts that he has the right to suspend Reams without an evidentiary showing that Reams has engaged in official misconduct pursuant to RSA 661:9, IV, based on his position as the chief law enforcement officer in the State. He asserts that the Court’s ability to review his decision to suspend:

[S]hould be limited to a determination of whether the Attorney General's decision was unlawful, that being, whether Attorney General Foster temporarily suspended County Attorney Reams for an unlawful reason such as on the basis of race, color, national origin, gender, age, marital status, sexual orientation, physical or mental disability, religious creed or political affiliation.

(Memo. of Law in Support of Obj. to Compl. For Declaratory Relief , 5).⁴

The New Hampshire Attorney General is the chief law enforcement officer of the State and retains all of his common law powers. Eames v. Rudman, 115 N.H. 91, 92–93 (1975). By statute, the Attorney General has general supervision of all of the criminal cases pending before the Supreme and Superior Courts of the State. RSA 7:6. The statute relating to the county attorneys provides specifically that “[t]he county attorney of each county shall be under the direction of the attorney general, and, in the absence of the latter, he or she shall perform all the duties of the attorney general’s office for the county.” RSA 7:34. RSA 7:11 provides:

Nothing herein contained shall relieve any officer or person of any duty prescribed by law relative to the enforcement of any criminal law, but such officer or person, in the enforcement of such law, shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same.

The New Hampshire Supreme Court has held that these statutes “demonstrate a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest.” Wyman v. Danais, 101 N.H. 487, 490 (1958). The New Hampshire Attorney

⁴ While not explicitly so stating, he asserts in substance that his discretion in suspending a county attorney is bounded by his discretion in instituting criminal charges. As a general rule, as long as a prosecutor’s discretion was not exercised in a discriminatory manner, whether to bring charges and what charges to bring rests solely in the prosecutor’s discretion. State v. Monahan, 125 N.H. 17, 26 (1984); see generally Oyler v. Boles, 368 U.S. 448, 456 (1962).

General has control over the county attorneys' decision to institute or abate criminal charges. Id.; see also State v. Swift, 101 N.H. 340, 342–43 (1958). Nowhere, however, do the statutes provide the Attorney General authority to control the management and operation of a county attorney's office, or to remove a county attorney.

In Eames, the New Hampshire Supreme Court held that the Attorney General, as the chief law enforcement officer in the State, had the right to temporarily suspend the Grafton County Attorney from exercising his criminal law enforcement authority where criminal charges were pending against the County Attorney. 115 N.H. at 91–93.

However, the Court also held specifically that the Attorney General has no authority to permanently remove a county attorney from office:

We recognize, as does the attorney general, that he has no power to remove the county attorney from office. This power is vested in the superior court by RSA 64:7. However, suspension from the performance of certain duties of an office is not removal . . . and the necessity of protecting the integrity of the prosecution function and maintaining public confidence in the administration of justice may require action short of removal from office.

Id. at 93 (citations and internal quotation omitted).⁵

The facts of Eames are instructive on the standard by which the propriety of a suspension by the Attorney General must be determined. In Eames, the Grafton County Attorney was charged with two misdemeanor charges of obscenity on June 28, 1974, for exhibiting two allegedly obscene movies. On July 1, 1974, after the County Attorney was charged with two other misdemeanors for exhibiting the same two movies on different days, the Attorney General advised him he could not exercise any of his law enforcement duties. On July 10, 1974, the Grafton County Attorney filed a petition for injunction in

⁵ RSA 64:7 is now codified as RSA 661:9, IV.

the Grafton County Superior Court, seeking to enjoin the Attorney General's actions. On July 23, 1974, a trial was held on the obscenity charges in a municipal court⁶ and the Grafton County Attorney was found guilty. He appealed for trial *de novo* to the Grafton County Superior Court where, following a two-and-a-half week trial, on October 22, 1974, he was acquitted of two of the charges and the jury deadlocked on two others. In its opinion, dated February 28, 1975, the Supreme Court noted that a retrial would be held on the deadlocked charges. In upholding the suspension of the Grafton County Attorney, the Court stated:

We hold that the temporary suspension of the county attorney from the exercise of his law enforcement duties while criminal charges are pending against him falls within both the statutory and common law powers of the attorney general and that there will *be no abuse of discretion* if the pending charges are promptly tried. The denial of injunctive relief by the trial court was therefore proper.

Id. (emphasis added).

The Removal Complaint makes civil claims: abuse of office by manipulating the management of a “forfeiture fund” to fund activities beyond the County Convention’s appropriation; an ethical violation in failing to disclose to subordinate prosecutors trying a case that one of his employees who testified in the trial had lied on her resume; and gender discrimination and harassment. Nowhere in the Removal Complaint does it allege that these allegations render Reams unable to function as a prosecuting attorney. See Reams, No. 218-2013-CV-1221, at 3, n.1 (Dec. 23, 2013); compare New Hampshire Bar Ass’n v. LaBelle, 109 N.H. 184, 185–86 (1968) (non-attorney may not appear as a candidate for county attorney, because he could not be able to carry out the functions of the county attorney).

⁶ Such a court is equivalent to a district division court and the circuit court.

Unlike the Grafton County Attorney, Reams has not been found guilty of criminal conduct in a District Court. In fact, Reams has not even been charged with a crime. The sole basis for the Attorney General's decision to suspend Reams is the unproven and untested allegations in the Removal Complaint brought pursuant to RSA 661:9, IV. Eames provides no authority for suspension.

Moreover, and critically, the Removal Complaint was not brought until March 11, 2014. An Answer is not due until April 26, 2014. The Attorney General has refused to expedite the litigation, objecting to a Motion for Discovery originally filed in this case on December 9, 2013, and renewed on March 12, 2014, on the technical ground that discovery is only appropriate in the Removal Complaint, and that the discovery had not been served in that case. (Obj. Mot. Compel Discovery, ¶ 2.). This discovery would obviously be germane to the Removal Complaint.

Given the complexity of the litigation,⁷ and the fact that it involves employment issues and therefore the right of non-litigating third parties, the parties agreed at the final hearing in this case on April 7, 2014, that the Removal Complaint brought by the Attorney General cannot be tried prior to the end of the County Attorney's term of office in January 2015. Therefore, as a practical matter, continued suspension would therefore constitute a *de facto* removal. Such a result is in clear violation of Eames.

C

The Attorney General nonetheless asserts that he is entitled to continue the suspension of Reams under In re Mussman, 112 N.H. 99 (1972) ("Mussman II"). In Mussman II, the New Hampshire Supreme Court held that it had constitutional and

⁷ According to the public record, the Attorney General's investigation began prior to November 6, 2013

statutory authority to suspend a sitting judge, even though the only mechanism to remove a judge was by impeachment or bill of address. The Court relied upon its authority in RSA 490:4, which gives it the authority to exercise general supervisory authority over courts in the State system, and Part 1, Article 35 of the New Hampshire Constitution, which requires that citizens be provided “judges as impartial as the lot of humanity will admit.” The Attorney General reasons that he has general supervisory authority over prosecutors, akin to the Supreme Court’s authority over lower courts, and may therefore suspend a prosecutor without the evidentiary hearing required by RSA 661:9, IV. But a careful reading of Mussman II, and an earlier related case, Mussman’s Case, 111 N.H. 402 (1971) (“Mussman I”) shows that it provides no support for his position.

In Mussman II, the Attorney General brought what he characterized as a petition for “Inquiry Into The Judicial Conduct Of Mack M. Mussman, Justice of the Littleton District Court” alleging that the judge, who was apparently a part-time lawyer as well as a judge, had been suspended from the practice of law. Mussman II, 112 N.H. at 100–01. Mussman II was decided on March 31, 1972. Although not referenced in the opinion, on December 30, 1971, the New Hampshire Supreme Court decided Mussman I, in which the New Hampshire Bar Association sought disciplinary action against Mussman based on his conduct as an attorney. In Mussman I, after a formal complaint was filed, an evidentiary hearing was held before a retired Justice of the Supreme Court—Hon. Amos N. Blandin—which included exhibits, and witnesses including the testimony of Mussman himself. Mussman I, 111 N.H. at 403–04. The Supreme Court upheld Justice

and concluded on March 11, 2014.

Blandin’s findings, made by clear and convincing evidence, that Mussman’s conduct in two cases was unethical, and “highly prejudicial to the administration of justice” and that it “reflects drastically on his fitness to practice law.” *Id.* at 404. The Supreme Court suspended Mussman from the practice of law “for a period to start January 31, 1972 and to continue until such suspension shall be terminated by further order of this court.” *Id.* at 412.

Despite these findings, which Mussman was collaterally estopped from challenging, the New Hampshire Supreme Court declined to take the sort of summary action the Attorney General has taken here:

In the present case, the petition for inquiry into the judicial conduct of the judge has not been heard and *we have only allegations in support of the petition*. The fact that the judge of the Littleton District Court is under suspension as an attorney might be used as a basis for some supervisory action by this court *However in the interest of a fair hearing it is deemed advisable to take no action at this juncture*. We conclude that this court has the power, upon a proper showing of abuse or misconduct, to order a suspension of a judge from sitting in his court or to assign some other judge in his place. The defendant’s motion to dismiss is denied *and the case is set down for hearing of the charges made and a report of findings to this court*.

Mussman II, 112 N.H. at 103 (emphasis added). Mussman II, therefore, not only provides no support for the Attorney General’s action, it illustrates the need for a judicial hearing of the allegations made by him before a drastic action such as the suspension of an elected county attorney may occur.⁸

III

The Defendants have also filed a Motion for Stay until the resolution of any appeal in the New Hampshire Supreme Court in the event this Court grants the relief

⁸ Only after a full hearing did the Court suspend Mussman, based upon his suspension as an attorney. See

requested in the Petition for Declaratory Judgment and reinstates Reams, to which Reams has objected. The Attorney General alleges that the stay is necessary because “[i]f Reams is allowed to return to [the Rockingham County Attorney’s Office], he will again be able to discriminate and retaliate against its employees,” (Mot. for Stay ¶ 6), and that “there are significant concerns that the employees who remain at [the Rockingham County Attorney’s Office] will again be subject to unacceptable and retaliatory behavior.”(Id. ¶ 7.) He recites that “[a]s discussed in the pre-hearing memo, the investigative findings support the conclusion that Reams has violated the rules of professional conduct, including his lack of candor regarding the forfeiture funds and his failure to ensure awareness and disclosure of exculpatory information regarding Ms. Long.” (Id. ¶ 8.)

This argument misses the mark. The entire point is that no findings have been made after notice and hearing, the fundamental requisites of due process. Like any other litigant, if the Attorney General believed he was likely to succeed on the merits of his Removal Complaint, and that irreparable harm would occur if injunctive relief were not granted in advance of trial, he could have petitioned for a preliminary injunction. He did not do so. Allegations, no matter how inflammatory, are not a substitute for evidence.

Nonetheless, the issues involved in this case are of first impression and complex. The allegations against Reams are serious. The suspension or removal of an elected public official raises significant issues. On the face of the Removal Complaint, it appears that the allegations involve conduct that occurred in a prior term of office—some as long

In re Mussman, 113 N.H. 54, 57 (1973), (Mussman III).

ago as 1999.⁹ Whether or not allegations that allege misconduct in a prior term of office can be considered in a removal action pursuant to RSA 661:9, IV has been expressly left open by the New Hampshire Supreme Court. Beaulieu, 113 N.H. at 72. Both parties have indicated that they will appeal a decision adverse to them.

Whether equitable relief should be stayed pending appeal requires a court to consider both the relative novelty of the legal issue involved and the consequences of a denial of the Motion for Stay. See In re Hilton, No. 13-7043-JCB, 2013 U.S. Dist. LEXIS 89692 (D.Mass. June 26, 2013); see also Ecker v. United States, No. 01-11310-NMG, 2008 U.S. Dist. LEXIS 109471 (D.Mass. July 24, 2008). Under the circumstances, the Court will grant the Defendant's Motion for Stay to the limited extent that the Court will stay its Order requiring reinstatement for 30 days from the Clerk's notice of decision so that the Defendants may file a Notice of Appeal to the Supreme Court and seek a further stay from that Court. If a Motion to Stay is filed with the notice of appeal in the Supreme Court, then this stay shall be extended only until the Supreme Court acts upon the Motion to Stay.

SO ORDERED.

4/10/14

DATE

s/Richard B. McNamara

Richard B. McNamara,
Presiding Justice

⁹ According to RSA 7:33, a county attorney is "elected biennially by voters of the county."

