

# The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

**Rockingham County Attorney James Reams**

v.

**New Hampshire Attorney General Joseph Foster**

**NO. 218-2013-CV-1221**

## **ORDER**

The Plaintiff, County Attorney James Reams (“Reams”) has filed a Complaint challenging his suspension by Attorney General Joseph Foster, seeking declaratory relief, finding that the suspension was unlawful and an order that this Court order reinstatement. A hearing was held on Reams’ request for immediate reinstatement on December 19, 2013. The Court believes that however characterized, the substance of this request was a request for a preliminary injunction. For the reasons stated in this Order, the Motion is DENIED. The parties have agreed that a final hearing on the complaint for declaratory and injunctive relief may be held on January 21, 2014.

I

This case arose on November 6, 2013 when New Hampshire Attorney General Joseph 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 the Rockingham County Attorney, and that petition was granted on an *ex parte* basis by this Court. The Chief Justice of the Superior Court has requested that the Superior Court, acting as a body, review that petition and *ex parte* order to determine whether or not an Acting County Attorney should be appointed in accordance with RSA 7:33.

County Attorney Reams then brought a Complaint seeking declaratory and injunctive relief, challenging his removal, and asserting that this Court should issue an order declaring his suspension unlawful, and reinstating him. The Court set a preliminary injunction hearing for December 5, 2013. County Attorney Reams moved to continue, and the hearing was scheduled for December 19, 2013.

Reams filed a Motion for Discovery on December 9, 2013, alleging that he had not been informed of the basis of the suspension and asserting that he was entitled to discovery so that he can challenge the suspension. The State objected to the Motion, and a hearing was held on the Motion on December 12, 2013. In an Order dated December 18, 2013, the Court denied the Motion and a hearing on the request for injunctive relief was held on December 19, 2013.

## II

As pointed out in the Court's December 18, 2013 order on discovery, the parties disagree on the Attorney General's right to suspend a County Attorney. Reams alleges:

[Because County Attorney Reams is a constitutional officer and elected official, he] is entitled to notice and hearing prior to imposition of a temporary suspension of his responsibilities. . . . [B]ecause he has not been charged with a crime, County Attorney Reams can be discharged from the obligations of his office only by a clear and convincing showing of his failure to fulfill his official responsibilities.

(Mot. for Expedited Hearing and Discovery ¶ 8.)

In his Memorandum supporting the Objection to the Complaint for Declaratory Relief, the Attorney General asserted that this Court's review of his decision:

[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.)

While not explicitly so stating, he asserted 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).

At oral argument at the December 19, 2013 hearing, the Attorney General asserted, for the first time, the right to suspend a County Attorney based on misconduct which is not criminal, and which would not require a criminal investigation. However, the Attorney General provided no authority for this proposition. There appears to be no statute or common law rule that provides the New Hampshire Attorney General authority over the operations and management of a county attorney's office<sup>1</sup>. As set forth *infra*, the Attorney General's authority to suspend is based upon his role as the chief law-

---

<sup>1</sup> The parties have not fully briefed this issue, and the Court recognizes that it is conceivable that matters which are wholly civil in nature could justify suspension if the civil matters affect the County Attorney's ability to function as a prosecuting attorney.

enforcement officer in the State, and the Legislature has provided a means to remove county officials for other misconduct in RSA 661:9. However, it is not necessary to address this issue at this time, because the Attorney General has explicitly stated that he is suspending Reams because there is a criminal investigation into his conduct.

County Attorney Reams has cited several decisions from other jurisdictions for the proposition that he, as an elected official, is entitled to notice and a hearing prior to the imposition of a temporary suspension of his responsibilities. See, e.g., State ex rel. Preissler v. Dostert, 260 S.E.2d 279 (W. Va. 1979). However, the cases upon which he relies involve different statutory schemes, and completely different factual scenarios. State ex rel. Ilvedson v. District Court, 291 N.W. 620 (N.D. 1940) (failure to follow statute relating to removal of prosecuting attorney); Lattimore v. Vernor, 288 P. 463 (Okla. 1930) (removal of a prosecuting attorney by judge); State ex rel. Thomas v. Henderson, 175 N.E. 865 (Ohio 1931) (removal of prosecuting attorney by judge without notice or hearing.)

A

Reams relies primarily upon Preissler, where the elected state's attorney sought to challenge a decision by a judge, a member of the judicial rather than the executive branch, to suspend him. The West Virginia Supreme Court held that a judge may not summarily remove an elected prosecutor in West Virginia pursuant to W.Va. Code § 7-7-8 based upon his failure to perform his duties without first conducting a full evidentiary hearing. State ex rel. Preissler, 260 S.E.2d at 287. Ironically, and germane to this case, is the fact that the West Virginia Supreme Court distinguished its prior holding in State ex rel. Matko v. Ziegler, 179 S.E.2d 735 (1971) in which a trial court had summarily

disqualified a prosecuting attorney who had been indicted by a grand jury, noting that in such a case “[t]here was no need for hearing since his status inherently rendered his prosecution of the case improper.” State ex rel. Preissler, 260 S.E.2d at 286.

While numerous cases deal with removal of prosecuting attorneys pursuant to statute, the parties have not cited, and the Court has not found, any case precisely on point. This may be in part due to different views taken of the authority of the Attorney General and the role of the Attorney General in the law enforcement systems of other states. Compare State v. Block, 263 P.3d 940 (N.M. Ct. App. 2011) (Attorney General has no common-law powers; instead, his duties are determined exclusively by statute), with State v. Lead Indus. Ass’n, 951 A.2d 428 (R.I. 2008) (in Rhode Island, the Attorney General is vested with all his common-law powers). Thus, precedents from other states are not particularly helpful and the Court believes that it must look to New Hampshire’s constitutional and statutory scheme, which may be *sui generis*. The cases cited by County Attorney Reams are not apposite to the unique circumstances of this case where the Attorney General, a constitutional officer, has statutory and common law discretionary authority over the county attorneys.

## B

The New Hampshire Attorney General occupies a pivotal and unique role in the New Hampshire criminal justice system. He 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). This common law power has been held to include the authority to intervene and supersede the county attorney. Id. Moreover, 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 “the 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. (Emphasis supplied).

Most importantly, 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*.

RSA 7:11 (Emphasis supplied).

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 statutes make it clear that the New Hampshire Attorney General is the “paramount authority” and has complete control over the county attorneys. Id.; see also Swift v. State, 101 N.H. 340, 342–43 (1961).

In Eames v. Rudman, 115 N.H. 91 (1975) the New Hampshire Supreme Court specifically held that the Attorney General, as the chief law-enforcement officer in the State, is vested with the constitutional and statutory right to temporarily suspend the county attorney from exercising his criminal law enforcement authority. Eames, 115 N.H. at 91–93 (1975). However, Court also held that the Attorney General has no authority to permanently remove a county attorney from office. Id.

The New Hampshire statutes specifically address the removal of county officers such as the Rockingham County Attorney. RSA 661:9, IV, provides, “[a]ny officer of a county, including the registrar of probate, may be removed by the Superior Court for official misconduct.” This statute recognizes the important public interest in allowing elected officials to carry out their obligations. Under this statute an elected official may not be removed for “every peccadillo”; misconduct, within the meaning of the statute, requires greater wrongdoing than ordinary misjudgment. In re Ash, 113 N.H. 583, 586 (1973) (suspension of Grafton County Sheriff). The Attorney General concedes that if an action were brought pursuant to RSA 661:9, IV, County Attorney Reams would be entitled to notice of the allegations against him, to discovery, and to present evidence at a hearing to demonstrate that removal is improper. (Memo. of Law in Support of Obj. to Compl. For Declaratory Relief 8.)

But in Eames, the New Hampshire Supreme Court specifically stated that “suspension from the performance of certain duties of an office is not removal.” Eames, 115 N.H. at 93 (citation omitted). The Court stated that “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. (citation omitted). As authority for that proposition, the Court cited In re Mussman, 112 N.H. 99 (1972), in which the Court affirmed its authority to order suspension of a sitting judge upon a proper showing of abuse or misconduct. Noting that the New Hampshire Constitution provides that “it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit,” the Court stated that “if the judiciary had no means by which this constitutional provision could be implemented in practice as well

as theory, the average citizen would wonder whether he was receiving the type of impartial justice that the constitution requires.” Id. at 102–03 (citation, quotation and brackets omitted). Similar considerations are applicable to the county attorney, who wields the vast charging power of the State.

The facts of Eames are instructive on the standard by which the propriety of suspension 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 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 court and the plaintiff was found guilty. He appealed for trial *de novo* to the Grafton County Superior Court where, following a two and one-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 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.

Eames, 115 N.H. at 93 (Emphasis supplied).



The Complaint in this case challenges the discretionary decision by the Attorney General to suspend the County Attorney. It is common sense that if the suspension were to become indefinite, it would constitute a removal proceeding under RSA 661:9, IV. But the record of the Eames case establishes that the Supreme Court did not believe that suspension from a period of July through February, based on the pendency of misdemeanor complaints, constituted an abuse of discretion.<sup>2</sup>

### III

The difference in this case is that County Attorney Reams has not been charged with a crime. Apparently reasoning that the charging decision in Eames was a sufficient basis for the Attorney General's action, in lieu of a factual hearing on the reasons for the suspension, the Attorney General submitted a summary of the investigation to date to the Court for *in camera* review by the Court, arguing that the *in camera* review would provide an adequate substitute for institution of a charge. (Memo. of Law in Support of Obj. to Compl. For Declaratory Relief 8–9.) However, the Attorney General cited no authority for this proposition, and the Court is not aware of any authority which would authorize such a procedure. Moreover, the Court believes that *in camera* review would not satisfy County Attorney Reams' rights. The Court did not review the summary, and it was returned to the Attorney General.

The “necessity of protecting the integrity of the prosecution function and maintaining public confidence in the administration of justice” plainly requires the

---

<sup>2</sup>Since the cases were appealed for a trial *de novo*, it is obvious that the four obscenity charges must have been misdemeanors; once the County Attorney was found guilty in the district court and appealed for a trial *de novo*, the parties stood “as though there has been no trial.” State v. Cook, 96 N.H. 212, 214 (1950) Moreover, the County Attorney was found not guilty of two charges in the Superior Court in October and,

Attorney General to investigate allegations of criminal wrongdoing against a County Attorney. Eames, 115 N.H. at 93 (citation and internal quotation omitted). There is no reason for the Court to review the status of the investigation, or the progress of the investigation. County Attorney Reams has requested, in substance, complete discovery of the investigation of which he is a target. He seeks any and all records examined by investigators, any and all witness statements taken by investigators and any and all police reports prepared by investigators, so that he may, in substance, challenge the factual basis for a claim of wrongdoing. (Mot. for Expedited Hearing and Discovery ¶¶ 12–13.) By submitting an investigation summary *in camera*, the Attorney General tacitly conceded the argument on relevance. The Court disagrees with both parties.

In the first place, deference to a coordinate branch of government requires that a court afford the Attorney General a presumption of good faith. A court may not assume that a prosecution results from intentional and purposeful discrimination enforcement of a law. State v. Monahan, 125 N.H. at 26; State v. Pinsince, 105 N.H. 38, 41 (1963). Second, and of greater moment, the issue of whether or not the Rockingham County Attorney has committed a criminal act is not the present inquiry before the Court. The issue to be determined is whether or not the Attorney General sustainably exercised his discretion in suspending the County Attorney during the pending investigation. Indeed, if there is a basis for an investigation, the Attorney General would be derelict in his duties if he did not investigate it. Important considerations are whether the investigation can be conducted if the County Attorney has access to his office, and whether, if the County Attorney is not suspended during the pendency of an

---

according to the record of the case, reelected during the pendency of the criminal proceedings.

investigation, “the average citizen would wonder if he was receiving the type of impartial justice the constitution requires.” In re Mussman, 112 N.H. at 102–03.

Third, the Court must respect the compelling public interest in the confidentiality of the investigation. The United States Supreme Court has noted that “if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony.” Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979). The New Hampshire Supreme Court has noted:

Once individuals have been tipped off to the nature and scope of an investigation, evidence may be destroyed prior to a search or after a search. (citations omitted). Having been revealed, witnesses may fear retaliation and refuse to cooperate with law enforcement during the crucial early stages of the investigation. (citations omitted). Individuals involved in criminal activity would be given the opportunity to craft stories to fit the current state of the investigation or to coordinate stories with others who, in fact, participated. (citations omitted).

Petition of State of New Hampshire (Bowman Search Warrants), 146 N.H. 621, 627–28 (2001).<sup>3</sup>

Finally, the fact that charges have not been brought does not necessarily alter the applicability of Eames. Reams has only been suspended since November 6, less than two months. It is simply a matter of fact that criminal investigations, properly conducted, may require substantial time, to ensure that the guilty are charged and the innocent are not. A prosecutor has the obligation to seek justice, not merely to convict. State v. Dowdle, 148 N.H. 345, 348 (2002). Part of a prosecutor’s obligation is determining not only when, but whether to bring charges, which can only be determined after careful and

---

<sup>3</sup> If the Court were to review and investigation *in camera*, it is not unreasonable to suppose that at some point a claim of due process would require that that investigation be unsealed. Cf. State v. Gagne, 136 N.H.

adequate investigation.

#### IV

The hearing held on December 19, 2013 was a hearing in advance of trial on the merits at which Reams sought injunctive relief. Legally, it can only be characterized as a preliminary injunction hearing. The parties agreed that the Court could base its Order following the hearing on the offers of proof presented.

Therefore, the moving party, County Attorney Reams, bears the burden of establishing that: (1) there is a likelihood of success on the merits of his claim; (2) irreparable injury will occur if he is not afforded injunctive relief; and (3) he has no adequate remedy at law. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). A court considering whether to grant the extraordinary remedy of injunction, must also consider whether the grant of an injunction would be in the public interest. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987).

As to the merits, County Attorney Reams bears the burden of establishing an unsustainable exercise of discretion by the Attorney General in suspending him pending the investigation. Review of the Attorney General's discretion requires consideration of whether, upon the circumstances known to him, maintaining "the integrity of the prosecution function and maintaining public confidence in the administration of justice" requires the action he has taken. Eames, 115 N.H. at 93 (citation and internal quotation omitted). Such circumstances include the ordinary considerations attendant to investigating criminal cases. In other words, a court may find that the Attorney General has sustainably exercised his discretion by a proffer of evidence that he has a basis for an

---

101 (1992).

investigation, that the investigation is ongoing, and that it is necessary that the County Attorney be suspended from his office in order to conduct the investigation.

Here, Assistant Attorney General Edwards made an offer of proof that following allegations of impropriety at the Rockingham County Attorney's Office, an investigation was initiated. Specifically, in mid-October, a Rockingham County Attorney alleged discriminatory acts which were reviewed by the Attorney General. The Attorney General then directed his senior staff to meet with additional individuals to corroborate the allegations. By November 5, senior staff, investigators from the Attorney General's Office, and members of the Federal Bureau of Investigation met with more than six additional witnesses located outside of the Rockingham County Attorney's Office. The allegations from the original witness were generally corroborated and additional issues were learned including those regarding a federally funded program. Assistant Attorney General Edwards asserted that on November 6, the Rockingham County Commissioners were informed of the findings up to that point, and that Attorney General Foster had decided to temporarily suspend County Attorney Reams' prosecutorial powers based on the allegations his senior staff had investigated, and based upon the corroboration of the allegations and the additional information regarding the federally funded program.

Furthermore, Assistant Attorney General Edwards stated that on November 7, five teams of state and federal investigators began interviews of all of the current Rockingham County Attorney staff over a six-day period. As part of these investigations, more than 50 people were interviewed. She asserted that as a result of these interviews, additional financial issues were discovered as well as ethical issues. There are currently requests and subpoenas out for additional documentary evidence from various

companies. In addition, a forensic accountant has been hired to review the federally funded program account and to organize and analyze all of the information obtained from the Rockingham County Attorney's Office. Finally, she represented that additional investigatory matters will be ongoing in January.

There is nothing in the record, and there is nothing presented by County Attorney Reams to suggest that the Court should not accept this proffer. As noted, deference to a coordinate branch of government requires that a court afford the Attorney General a presumption of good faith. State v. Monahan, 125 N.H. at 26; State v. Pinsince, 105 N.H. at 41. As demonstrated, the Attorney General has authority to suspend a County Attorney when a criminal investigation is pending. Under these circumstances, County Attorney Reams has not established a likelihood of success on the merits.

Moreover, he has not established that he will suffer irreparable harm as the result of suspension. No claim has been made that he has suffered any financial detriment as the result of a suspension. No quantifiable injury will result to if he is suspended for a limited period of time so that the investigation can be completed. While the criminal investigation against him is secret, there are compelling reasons why criminal proceedings must be secret. See Petition of State of New Hampshire (Bowman Search Warrants) 146 N.H. at 627-28. Moreover, the secrecy of criminal proceedings may save an innocent person, against whom charges have been considered, from the infamy of having been accused of committing a crime. Powell v. Pappagianis, 108 N.H. 523, 525 (1968). Virtually all of the information about the facts of a criminal investigation was first released by Reams in his motion for discovery; the State has responded only to the extent necessary to satisfy its burden in response to the proceedings instituted by

Reams. On this record, the Court cannot find that Reams will suffer irreparable harm if injunctive relief is not granted.

It is true that County Attorney Reams has no adequate remedy at law. But it is equally true that there is a compelling state interest in allowing the suspension to remain in effect. The public has a compelling interest in seeing to it that criminal prosecutions are conducted in a fair and lawful way, untainted by any suggestion of criminal wrongdoing. If Reams were allowed to act as County Attorney during the pendency of this investigation, as Chief Justice Kenison noted, “the average citizen would wonder whether he was receiving the type of impartial justice that the constitution requires.” In re Mussman, 112 N.H. at 102–03. Considering all of these factors, the Court finds that County Attorney Reams is not entitled to preliminary injunctive relief. It follows that the County Attorney’s request for preliminary injunctive relief must be denied.

However, as the Court stated in Eames v. Rudman, the Attorney General “has no power to remove the county attorney from office”. Id. at 93. That power is vested in the Superior Court pursuant to RSA 661:9. IV. Removal of a county official can only occur after the official is provided notice of the allegations against him, the opportunity to be heard, and a trial before Justice of the Superior Court. Hillsborough County v. Beaulieu, 113 N.H. 69, 70 (1973).

Both parties have agreed to a final hearing on January 21, 2014<sup>4</sup>. At the hearing, the county attorney may raise the issue of whether or not the suspension of his prosecutorial authority is in fact an attempt to remove him without providing him the

---

<sup>4</sup> A temporary hearing in Reams’ action against the Rockingham County Commissioners will be

rights to which he is entitled under RSA 661. The parties may proceed at this hearing by offer of proof, but evidence will be taken if the parties cannot agree to proceed by offer of proof.

**SO ORDERED**

12/23/13  
DATE

RBM/

Richard B. McNamara  
Richard B. McNamara,  
Presiding Justice

---

held on that same date, but not consolidated with this case.