STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 10, 2015)

JOHN DOE,	:	
Petitioner,	:	
	:	
v.	:	**C.A. No. PM-14-3369**
	:	
CRANSTON POLICE DEPARTMENT, RHODE ISLAND STATE POLICE, KEVIN BARRY, in his capacity as Acting Police Chief of the Police Department for the City of Cranston, and ALLAN FUNG, in his capacity as the Mayor of the City of Cranston,	:	
Respondents.	:	

DECISION

GIBNEY, P.J. Presently before the Court are two motions, one made by the petitioner, "John Doe" (Doe or Petitioner) on July 7, 2014, and one made by the Rhode Island State Police on August 8, 2014. The respondents in this case are the Cranston Police Department (the CPD), the Rhode Island State Police (the RISP), Acting CPD Police Chief Kevin Barry, the City of Cranston, and the Mayor of the City of Cranston, Allan Fung (Mayor Fung) (collectively, Respondents). The first motion is brought by Petitioner against all Respondents seeking to have the charges filed against him dismissed. The second motion is brought by the RISP, individually, for dismissal of the Petitioner's Amended Verified Miscellaneous Petition (Petition) pursuant to Super. R. Civ. P. 12(b)(6) (Rule 12(b)(6)) and in the alternative, Super. R. Civ. P. 56 (Rule 56). For the reasons stated below, the Petitioner's motion is denied, and the RISP's motion is granted.

I

Facts & Travel

Petitioner is a captain with the CPD. In late 2013, the CPD launched an internal investigation into Petitioner's alleged involvement in a purported scheme to selectively enforce Cranston's overnight parking ordinance in the wards of Cranston City Councilmen Steven Stycos and Paul Archetto. In early 2014, however, Mayor Fung requested that the RISP assume control of the internal investigation. The RISP and the CPD believe that the purpose of this alleged scheme was to retaliate against Councilmen Stycos and Archetto for having voted against a proposed collective bargaining agreement between the City of Cranston and Cranston Police Officers. The internal investigation conducted by the RISP, however, was not a targeted investigation of the Petitioner individually. Rather, the investigation was a general inquiry into whether Cranston Police Officers had selectively enforced the overnight parking ban as a means of retaliation. The investigation did, however, uncover evidence that led the CPD to initiate disciplinary proceedings against the Petitioner for his alleged involvement in the purported parking ticket scheme.

Pursuant to the Law Enforcement Officers' Bill of Rights (LEOBOR), G.L. 1956 §§ 42-28.6-1 through 42-28.6-17, the CPD issued a complaint and notice to Petitioner, indicating a recommended penalty of termination, and suspended him from duty with pay pending the conclusion of the LEOBOR proceedings. On April 4, 2014, Petitioner exercised his right under § 42-28.6-4(a) to have a hearing before a three-member committee to determine the validity of the CPD's allegations of misconduct. Section 42-28.6-4 of the LEOBOR statute provides that such a hearing committee shall be composed of three "active or retired law enforcement officer[s]," one of whom shall be chosen by the employee facing disciplinary charges and

another of whom shall be chosen by the employer. The employer must inform the law enforcement officer of its committee member selection "within five (5) days of its receipt of the officer's request for a hearing." Sec. 42-28.6-4(e). The third committee member shall serve as the chairperson and shall be chosen by agreement of the other two committee members or, if they cannot agree, then by appointment by the Presiding Justice of the Superior Court. Secs. 42-28.6-1, 42-28.6-4. Accordingly, the CPD named Major Todd Catlow (Major Catlow) of the RISP to serve on Petitioner's hearing committee, and Petitioner named West Warwick Lieutenant James Tiernan (Lt. Tiernan). Major Catlow and Lt. Tiernan were unable to agree on a third committee member. Major Catlow therefore sent a letter to the Presiding Justice, requesting that she appoint someone. The Presiding Justice then asked Lieutenant Ann Assumpico (Lt. Assumpico) of the RISP to serve as the chairperson, and Lt. Assumpico accepted the appointment on July 2, 2014.

On July 7, 2014, Petitioner commenced the instant action by filing a Verified Miscellaneous Petition, a motion to dismiss all charges filed against the Petitioner, and a memorandum of law in support of the motion to dismiss all charges. Given the pendency of Petitioner's motion before this Court, on July 16, 2014, Respondents moved for an extension of the statutory time period in which to commence Petitioner's LEOBOR hearing.[1] This Court granted Respondents' motion on July 22, 2014 and extended the time within which Petitioner's LEOBOR hearing must begin to thirty days after entry of a final disposition on the motion. Doe v. Cranston Police Dep't, No. 14-3369, July 22, 2014 (Order) Gibney, P.J. On July 24, 2014, Respondents filed their answer to Doe's Verified Miscellaneous Petition, their objection to the

[1] Section 42–28.6–5(b) provides that a LEOBOR hearing "shall commence within thirty (30) days after the selection of a chairperson of the hearing committee"; however, such time limit "may be extended by the presiding justice of the superior court for good cause shown." Sec. 42-28.6-5(b).

motion to dismiss all charges, and their motion in support of that objection. On that same day, Petitioner filed an Amended Verified Miscellaneous Petition adding a single count alleging that Respondents violated his right to a duly appointed and unbiased hearing committee.[2] (Am. Verified Misc. Pet., at 14). Finally, on August 8, 2014, the RISP filed a motion to dismiss Petitioner's petition pursuant to Rule 12(b)(6), or in the alternative, Rule 56.

II

Standard of Review

A

Miscellaneous Petition

The Petitioner has sought to invoke this Court's jurisdiction by filing his Verified Miscellaneous Petition. In City of Pawtucket v. Laprade, our Supreme Court recently held that "LEOBOR proceedings are not exempt from the longstanding rule that the jurisdiction of the Superior Court must first be invoked by the filing of a complaint or *miscellaneous petition*[.]" 94 A.3d 503, 514-15 (R.I. 2014) (emphasis added). However, Rule 80 of the Superior Court Rules of Civil Procedure provides, in pertinent part:

[2] Citing Leo v. Maro Display Inc., Respondents argue that Doe's Petition was not filed before their answers because "[t]he law does not regard a part of a day" and therefore the additional count should be stricken. 122 R.I. 737, 738, 412 A.2d 221, 222 n.2 (1980). In response, Petitioner argues that in a strictly temporal sense, Doe filed his Petition before the Respondents submitted their answer to the Court. This Court, however, need not decide the merits of these particular arguments. Rule 15(a) of the Superior Court Rules of Civil Procedure (Rule 15) provides that "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Rule 15. Here, judicial efficiency shall be advanced by having all related claims litigated in one action, and this Court finds no reason to forbid the Petitioner from fleshing out his claim. Guantanamera Cigar Co. v. Corporacion Habanos, S.A., 263 F.R.D. 1, 4 (D.D.C. 2009); see Lomastro v. Iacovelli, 56 A.3d 92, 95 (R.I. 2012) (citing with approval the Supreme Court's interpretation of Rule 15(a) of the Federal Rules of Civil Procedure, which contains language that parallels that of our state rule). Accordingly, this Court finds that the Petitioner's Rule 15(a) motion should be granted. Furthermore, in light of the fact that the Respondents have had an opportunity to provide answers to the Petition, this Court shall consider the Petitioner's additional claim as part of the motion to dismiss.

> "[w]hen a statute provides for review by the Superior Court of any action by a governmental agency, department, board, commission, or officer, *whether by appeal or petition* or otherwise or when any judicial review of such action was heretofore available by extraordinary writ, proceedings for such review *shall be instituted by filing a complaint with the court*. The complaint shall include a concise statement showing that the plaintiff is entitled to relief, and a demand for judgment for the relief the plaintiff seeks." Super. R. Civ. P. 80 (emphasis added).

Here, the Petitioner has filed an Amended Verified Miscellaneous Petition, not a complaint. However, as the Amended Verified Miscellaneous Petition served to initiate a cause of action against Respondents and outlined the pertinent factual allegations and claims, this Court shall—for the purposes of this Decision—construe the Amended Verified Miscellaneous Petition as the functional equivalent of a complaint.[3]

B

Procedural Posture

Ordinarily, the court's review of a motion to dismiss is confined to the complaint, Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009), and if the court considers matters outside the complaint, the court must convert the motion into a motion for summary judgment. See Coia v. Stephano, 511 A.2d 980 (R.I. 1986). However, in deciding whether to grant a Rule 12(b)(6) motion to dismiss, the Court may properly consider "documents expressly relied on or integral to the complaint and matters of public record, if the claims of plaintiff are based upon such documents." Rowe v. Morgan Stanley Dean Witter, 191 F.R.D. 398, 405 (D.N.J. 1999); In

[3] Rule 12(b)(6) uses the general term "pleading." See Rule 12(b)(6); Black's Law Dictionary 1339 (9th ed. 2009) (defining a "pleading" as "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses"); Id. at 332 (defining a "complaint" as "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief"); Id. at 1329 (defining a "petition" as "[a] formal written request presented to a court or other official body").

re Burlington Coat Factory, 114 F.3d 1410, 1426 (3d Cir. 1997); see also Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721 (R.I. 2003). Therefore, the Court may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss, without converting the motion into one under Rule 56. Bowen Court Assocs., 818 A.2d at 725-26 (citing Super. R. Civ. P. 10(c)); 27A Federal Procedure L. Ed. § 62:509 (2004). Such documents "must be referred to explicitly," and be "exhibit[s] annexed to the complaint." 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); see also 5B Wright & Miller, Federal Practice & Procedure, § 1357 (3d ed. 2006).

Here, as a preliminary matter, the Petitioner attached to the Petition a variety of newspaper articles as well as the RISP's investigative report entitled, *Selective Enforcement of the Cranston City Ordinance "Overnight Parking" by Sworn Members of the Cranston Police Department*. These documents were attached to the Petition and were referenced therein; however, none of these documents is relevant as to whether the Petitioner has "fail[ed] to state a claim upon which relief can be granted." Rule 12(b)(6). Therefore, this Court shall apply the Rule 12(b)(6) standard.

C

Rule 12(b)(6) Standard of Review

The "sole function of a motion to dismiss" pursuant to Rule 12(b)(6) is "to test the sufficiency of the complaint." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (citing R.I. Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). "When ruling on a Rule 12(b)(6) motion, the [court] must look no further than the complaint, assum[ing] that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor." Bernasconi, 557 A.2d at 1232. However, "allegations that are more in the nature of legal conclusions rather

than factual assertions are not necessarily assumed to be true." DiLibero v. Mortg. Elec. Registration Sys., Inc., 2015 WL 171238, at *2 (R.I. Jan. 14, 2015) (citing Doe ex rel. His Parents and Natural Guardians v. East Greenwich Sch. Dep't, 899 A.2d 1258, 1262 n.2 (R.I. 2006); see also Robert B. Kent et al., Rhode Island Civil Procedure § 12:9, III–44 (West 2006) (stating "sweeping legal conclusions are not admitted" for the purposes of reviewing a Super. R. Civ. P. 12(b)(6) motion for failure to state a claim upon which relief can be granted). "The motion may then only be granted if it 'appears beyond a reasonable doubt that a plaintiff would not be entitled to any relief under any conceivable set of facts . . . .'" Id. (quoting Ryan v. State, Dep't of Transp., 420 A.2d 841, 843 (R.I. 1980)).

D

The LEOBOR Statute

Enacted in 1976, LEOBOR provides, in pertinent part, that it "is the exclusive remedy for permanently appointed law-enforcement officers who are under investigation by a law-enforcement agency for any reason that could lead to disciplinary action, demotion, or dismissal." Laprade, 94 A.3d at 511 (citing Lynch v. King, 120 R.I. 868, 870 n.1, 391 A.2d 117, 119 n.1 (1978)); In re Simoneau, 652 A.2d 457, 460 (R.I. 1995). "When convened in accordance with the provisions of LEOBOR, a hearing committee is vested with 'broad powers to investigate allegations of police misconduct, hold hearings, and issue decisions that affect the individual rights of permanently appointed law enforcement officers."' Laprade, 94 A.3d at 512 (citing Lynch, 120 R.I. at 878, 391 A.2d at 123). However, it is well settled that "the statutory scheme 'does not give the hearing committee the power summarily to dismiss charges for procedural violations of the Law Enforcement Officers' Bill of Rights.'" Id.; see In re Sabetta, 661 A.2d 80, 83 (R.I. 1995) ("The language of § 42–28.6 does not give the hearing committee

the power summarily to dismiss charges for procedural violations of the Law Enforcement Officers' Bill of Rights.").

Thus, "[a]ny law enforcement officer who is denied any right afforded by this subtitle may apply . . . to the superior court . . . for any order directing the law enforcement agency to *show cause* why the right should not be afforded." Sec. 42-28.6-14(b) (emphasis added). Furthermore, § 42-28.6-12(a) provides:

> "[a]ppeals from all decisions rendered by the hearing committee shall be to the superior court in accordance with §§ 42-35-15 and 42-35-15.1. For purposes of this section, the hearing committee shall be deemed an administrative agency and its final decision shall be deemed a final order in a contested case within the meaning of §§ 42-35-15 and 42-35-15.1." Sec. 42-28.6-12(a).

Therefore, a police officer who wishes to appeal his case to the Superior Court must first "exhaust[] all administrative remedies available to him or her within the agency" and be "aggrieved by a final order in a contested case[.]" Sec. 42-35-15(a). However, "[a]ny preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy." Id.

III

Analysis

A

Petitioner's Motion to Dismiss All Charges

In his motion, Petitioner broadly alleges that the CPD, Mayor Fung, and the RISP committed various violations of the LEOBOR statute in conducting the disciplinary proceedings against him. Petitioner further challenges the validity of this Court's appointment of Lt. Assumpico as the hearing committee chair. In arguing that such appointment was procedurally improper, Petitioner maintains that Major Catlow's letter to the Presiding Justice, asking her to

appoint a chairperson, did not properly invoke the Court's jurisdiction to make such an appointment. As a remedy for these alleged statutory and procedural violations, Petitioner asks the Court to dismiss, with prejudice, the CPD's disciplinary charges against him. Respondents, however, assert that the LEOBOR does not empower the Court to summarily dismiss their disciplinary proceeding and, furthermore, that Lt. Assumpico's appointment was procedurally proper. Moreover, Respondents object to Petitioner's use of a pseudonym in filing the motion without first seeking leave of the Court.

1

Appointment of a Hearing Committee Chairperson

Citing our Supreme Court's recent decision in Laprade, 94 A.3d at 503, Petitioner argues that this Court did not have proper jurisdiction to appoint a chairperson to his hearing committee. Specifically, Petitioner asserts that Major Catlow's sending a letter to the Presiding Justice requesting the appointment of Lt. Assumpico was procedurally infirm. Respondents, however, claim that for years it has been common practice in LEOBOR proceedings for one of the hearing committee members to submit such requests by letter to the Presiding Justice. Moreover, Respondents point out that the Supreme Court issued its decision in Laprade after Major Catlow requested the chairperson appointment and after the Presiding Justice made that appointment.

Demonstrating that LEOBOR "is not a model of clarity," the statute uses different language in two different provisions to direct how hearing committee members may request the Presiding Justice to appoint a chairperson. Providence Lodge No. 3, Fraternal Order of Police v. Providence External Review Auth., 951 A.2d 497, 505 (R.I. 2008). First, § 42-28.6-1(2)(i) provides that "[i]n the event that the other two (2) members are unable to agree [on a hearing committee chairperson] . . . then either member will *make application* to the presiding justice of

the superior court and the presiding justice shall appoint the third member[.]" Sec. 42-28.6-1(2)(i) (emphasis added). However, § 42-28.6-4(f) provides that, if "the hearing committee members selected by the officer and by the agency" cannot agree on the selection of a chairperson, then they "shall . . . *[p]etition* the presiding justice of the superior court to select a third hearing committee member[.]" Sec. 42-28.6-4(f) (emphasis added).

The LEOBOR statute does not define either "petition" or "application." In common legal parlance, "petition" can broadly refer to any "formal written request presented to a court or other official body" or to a pleading akin to a complaint. Black's Law Dictionary 1329 (9th ed. 2009); accord Jaster v. Comet II Constr., Inc., 382 S.W.3d 554, 560 (Tex. App. 2012) (noting that the court could "see no functional difference between the words 'petition' and 'complaint'" when applied to a pleading that initiated a counterclaim). Thus, the statute's terms do not clearly set forth the mechanism by which the hearing committee members must request the Presiding Justice to appoint a chairperson.

In Laprade, our Supreme Court dealt with an analogous issue, namely that the statute "does not set forth the method by which a request to the presiding justice to extend the time limits [for a hearing to commence] may be made." Laprade, 94 A.3d at 514. In that case, the Court held that despite the statute's lack of specificity, "LEOBOR proceedings are not exempt from the longstanding rule that the jurisdiction of the Superior Court must first be invoked by the filing of a complaint or miscellaneous petition and may not be invoked by letter—or telephone call—to the presiding justice." Id. at 514-15. Critical to the Court's holding, however, was the fact that the Presiding Justice had acted in a "judicial proceeding" and "not . . . in an administrative role" when she extended the hearing commencement time limit. Id. at 515. Specifically, the Court found that a judicial proceeding had taken place in Laprade because the

Presiding Justice "took the bench, in open court, with a stenographer present, to hear argument" on "an issue that was contested between the parties." Id. Furthermore, the Presiding Justice "exercise[d] her judicial discretion" to issue an order "with the force of law." Id. at 515-16.

Thus, the Supreme Court made a significant distinction in Laprade between the procedures necessary to invoke the Presiding Justice's jurisdiction in judicial proceedings versus when the Presiding Justice is fulfilling an administrative function. Id.; compare Black's Law Dictionary 29 (9th ed. 2009) (defining an "administrative act" as "[a]n act made in a management capacity; esp., an act made outside the actor's usual field (as when a judge supervises court personnel)"), with id. at 30 (defining a "judicial act" as "[a]n act involving the exercise of judicial power") and id. at 1398 (defining a "judicial proceeding" as "[a]ny court proceeding; any proceeding initiated to procure an order, whether in law or in equity"); accord Gomez v. State Bar of Texas, 856 S.W.2d 804, 809 (Tex. App. 1993) rev'd on other grounds sub nom. The State Bar of Texas v. Gomez, 891 S.W.2d 243 (Tex. 1994) (explaining that "[c]ourts exercise two distinct types of functions: (1) adjudicative, by which they decide disputes through a system of legal actions, proceedings, and remedies; and (2) administrative, by which they supervise various aspects of the judicial system"). Accordingly, the Supreme Court's holding in Laprade requires a complaint or petition to invoke the Presiding Justice's jurisdiction only for "judicial proceedings" or other instances in which the Presiding Justice must use judicial discretion or authority, rather than when the Court is acting in "an administrative role." Laprade, 94 A.3d at 515. Such a reading comports with our Supreme Court's stated goal of "streamlin[ing] the [LEOBOR] process" by not requiring formal court filings and docketing of cases before the Presiding Justice may carry out ministerial functions that do not invoke her judicial authority to resolve contested cases. Id.

Unlike in Laprade, where the justice took the bench and heard argument, here, the Court did not take the bench or exercise judicial discretion. Major Catlow and Lt. Tiernan were unable to agree on a third committee member, and thus "[p]etition[ed] the presiding justice of the superior court to select a third hearing committee member . . . [to] serve as chairperson of the hearing committee[.]" Sec. 42-28.6-4(f)(ii). Accordingly, the Presiding Justice wrote a letter to Lt. Assumpico requesting her service as LEOBOR chairperson. Such appointment was an administrative function, not a judicial proceeding, and thus no complaint or petition was required to invoke this Court's authority to do so.

2

Dismissal of the LEOBOR Proceedings

Petitioner seeks dismissal of the CPD's disciplinary complaint against him for the following reasons: 1) Major Catlow's appointment to the hearing committee was invalid because prior to the CPD's filing of disciplinary charges against Petitioner, Major Catlow was involved in and had already reviewed evidence stemming from the investigation into Petitioner's alleged misconduct; 2) Petitioner was not given timely notice of the CPD's hearing committee member selection because Major Catlow's appointment was invalid; 3) it was unlawful for the RISP to conduct an investigation into Petitioner's alleged misconduct because the RISP was not Petitioner's employer; 4) Mayor Fung violated Petitioner's right to confidentiality, as guaranteed by LEOBOR, by revealing his name at a press conference; and 5) Respondents violated Petitioner's right to a duly appointed and unbiased hearing committee. Respondents, however, maintain that, regardless of the validity of Petitioner's allegations, this Court has no authority under LEOBOR to summarily dismiss the CPD's disciplinary charges against Petitioner.

Pursuant to the LEOBOR statute, the Superior Court's role in the disciplinary

proceedings of law enforcement officers is restricted to several narrow circumstances. The Presiding Justice may appoint a hearing committee chair at the request of the other hearing committee members and may extend the time in which a LEOBOR hearing must commence. Secs. 42–28.6-1, 42–28.6–4, 42-28.6-5. Additionally, the Superior Court has jurisdiction to issue a stay of an employee's suspension without pay and to hear "[a]ppeals from all decisions rendered by the hearing committee." Secs. 42-28.6-13(d), 42-28.6-12(a). Lastly, § 42-28.6-14(b) provides that "[a]ny law enforcement officer who is denied any right afforded by [LEOBOR] may apply . . . to the superior court where he or she resides or is regularly employed for any order directing the law enforcement agency to show cause why the right should not be afforded." Thus, the LEOBOR statute gives this Court no explicit authority to dismiss all of the CPD's disciplinary charges against Petitioner with prejudice.[4]

A threshold issue in the instant motion is whether this Court may grant Petitioner the relief he requests absent explicit statutory authority to do so. Our Supreme Court faced a similar question involving the authority of LEOBOR hearing committees in In re Sabetta, 661 A.2d 80. In that case, the hearing committee had summarily dismissed disciplinary charges against a law

[4] Section 42-28.6-4(e) provides:

> "[t]he charging law enforcement agency shall provide the law enforcement officer with the name of one active or retired law enforcement officer to serve on the hearing committee, within five (5) days of its receipt of the officer's request for a hearing. *Failure by the charging law enforcement agency to file its hearing committee selection within that time period shall constitute a dismissal of all charges against the law enforcement officer, with prejudice*; provided, however, that the presiding justice of the superior court, upon petition and for good cause shown, and permit the filing of an untimely hearing committee selection by the agency." Sec. 42-28.6-4(e) (emphasis added).

However, there is no question that the CPD timely provided Doe with notice of its selection of Major Catlow.

enforcement officer on the grounds that the officer's employer had violated LEOBOR procedures. In re Sabetta, 661 A.2d at 83. However, the Supreme Court found that the hearing committee had been "clearly in error in dismissing the charges" because "[t]he language of § 42–28.6 does not give the hearing committee the power summarily to *dismiss* charges for procedural violations of the Law Enforcement Officers' Bill of Rights." Id. (emphasis in original); see also Laprade, 94 A.3d at 512 (affirming holding in In re Sabetta). Similarly, in In re Denisewich, 643 A.2d 1194, 1197 (R.I. 1994), our Supreme Court ruled that the Superior Court lacks authority to order a LEOBOR hearing committee to reconvene after it has reached a final decision "[b]ecause the Officers' Bill of Rights is devoid of any enumerated statutory provision that grants the Superior Court [such] authority[.]" Thus, our Supreme Court has clearly directed that the LEOBOR statute "must [be] appl[ied] . . . as written." In re Denisewich, 643 A.2d at 1197. This Court will not construe its authority under LEOBOR to be greater than that which the statute clearly provides. Here, the authority to summarily dismiss charges for procedural violations is not enumerated among this Court's powers in the LEOBOR statute.

Moreover, this Court's lack of jurisdiction to enter the relief Petitioner requests is made even clearer by the fact that LEOBOR provides for a specific form of relief—distinct from that which Petitioner requests—for Petitioner's claimed grievances. In particular, § 42–28.6–14(b) allows "[a]ny law enforcement officer who is denied any right afforded by [LEOBOR]" to apply "to the superior court where he or she resides or is regularly employed for any order directing the law enforcement agency to show cause why the right should not be afforded." See In re Sabetta, 661 A.2d at 83 (holding that "the proper remedy for an infringement of rights provided by [LEOBOR] is provided under § 42–28.6–14"). Thus, the proper remedy for an infringement of rights under the LEOBOR is to apply to the Superior Court "for any order directing the law

enforcement agency to show cause why the right should not be afforded." Sec. 42-28.6-14(b); see also In re Sabetta, 661 A.2d at 83 (concluding that aggrieved officer should have applied to Superior Court for an order directing the municipality to show cause why his right to an investigation conducted without public comment should not be afforded). Here, Petitioner has not applied for an order showing cause why his various rights should not be afforded; rather, he requests that this Court summarily dismiss all charges filed against him. This Court is without jurisdiction at this juncture to dismiss the CPD's LEOBOR proceeding against Petitioner.

B

Pseudonymous Pleading

Although Petitioner's motion is denied on other grounds, the Court will briefly address Respondents' concern over Petitioner's filing the motion under a pseudonym without first seeking leave of the Court. Because Petitioner might file a new petition pursuant to § 42–28.6–14(b), this Court would be remiss if it did not caution against filing any pleadings in Superior Court under a fictitious name without prior approval from the hearing justice.

"[T]he 'customary and constitutionally-embedded presumption of openness in judicial proceedings' requires that litigants proceed under their own names unless an exceptional circumstance requiring anonymity exists." Doe v. Burkland, 808 A.2d 1090, 1096 (R.I. 2002). This principle is codified in Super. R. Civ. P. 10(a), which provides that "[i]n the complaint the title of the action shall include the names of all the parties[.]"[5] This rule, therefore, "instantiates

[5] Petitioner initiated the instant action by filing a Petition, rather than a "complaint," which is the pleading specifically named in Super. R. Civ. P. 10(a). Nonetheless, Super. R. Civ. P. 10(a) applies to Petitioner's Petition because, given that it served to initiate a cause of action against Respondents and outlined factual allegations and claims, this particular Petition is the functional equivalent of a complaint. Cf. Jaster, 382 S.W.3d at 560 (noting that a pleading could be accurately referred to as either a petition or a complaint when the purpose of such pleading was to initiate a counterclaim).

the principle that judicial proceedings, civil as well as criminal, are to be conducted in public." Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869, 872 (7th Cir. 1997) (interpreting the analogous Fed. R. Civ. P. 10(a)). As such, "[a]nonymous pleading is the exception to [this rule]," and the decision whether to allow "a plaintiff the right to proceed using a pseudonym, . . . is within the sound discretion of the hearing justice." Doe v. Barrow Cnty., Georgia, 219 F.R.D. 189, 191 (N.D. Ga. 2003) (applying the analogous Fed. R. Civ. P. 10(a)); Pelland v. State, 919 A.2d 373, 376 (R.I. 2007).

Because "[t]he use of fictitious names is disfavored" and should only be permitted if "exceptional circumstances justify such a departure from the normal method of proceeding in . . . courts . . . the privilege of suing or defending under a fictitious name should not be granted automatically." Blue Cross & Blue Shield United of Wisconsin, 112 F.3d at 872. Rather, our Supreme Court has ruled that trial justices must weigh the following factors in deciding whether to allow a party to litigate under a pseudonym:

> "(1) the extent to which the identity has been kept confidential; (2) the reasons the litigant fears public disclosure; (3) the public interest in concealing the litigant's identity; (4) circumstances that create an atypically weak interest in public disclosure; and (5) the legitimacy of the motives both of the litigant seeking pseudonymity and the party seeking to force disclosure." Pelland, 919 A.2d at 377 (citing Burkland, 808 A.2d at 1096-97 n.6).

Accordingly, in any future action before the Superior Court, Petitioner may only proceed pseudonymously if he first presents some reasons convincing the Court that the Pelland factors weigh in favor of allowing him to do so.

C

The RISP's 12(b)(6) Motion to Dismiss

Doe's Petition sets forth a litany of allegations against the RISP, the CPD, Mayor Fung, Lt. Assumpico, and Major Catlow. More specifically, Petitioner alleges 1) Major Catlow was presented with evidence prior to being appointed as a LEOBOR hearing committee member in violation of § 42-28.6-1(2)(i); 2) it is illegal for the RISP to perform a LEOBOR investigation of a Cranston Police Officer; 3) the CPD failed to timely select a third LEOBOR hearing committee member; and 4) Respondents violated Petitioner's right to a duly appointed and unbiased hearing committee. As a remedy for these alleged statutory and procedural violations, Petitioner asks the Court to dismiss, with prejudice, the CPD's disciplinary charges against him. In its motion, the RISP contends that the Petitioner has failed to state a legally cognizable cause of action against the RISP and, furthermore, the Petition is procedurally improper because the Petitioner has not exhausted the administrative remedies available to him. In response, Petitioner generally argues that exhaustion would be futile and the LEOBOR hearing committee cannot provide the relief that he seeks.

At the outset, this Court will address the allegation of an illegal investigation. Petitioner's allegation that the RISP conducted an illegal LEOBOR investigation is without merit. A LEOBOR investigation has yet to occur. Furthermore, there is a significant distinction between the RISP's internal investigation of the CPD and the pending LEOBOR investigation into the Petitioner's actions. Mayor Fung requested that the RISP assume control of an internal investigation into the CPD; however, the RISP, as an agency, has not assumed control of the instant LEOBOR investigation. Accordingly, the LEOBOR hearing committee—not the RISP—shall investigate and ultimately decide upon the charges brought against the Petitioner.

Petitioner also alleges that because Major Catlow is a member of the RISP, and also a member of the hearing committee, any decision rendered by the committee will be somehow void. Petitioner's argument, however, is of no moment. Petitioner conveniently ignores the fact that Major Catlow was properly nominated in accordance with § 42-28.6-4(e).[6]

Having found that the RISP did not conduct an illegal LEOBOR investigation, this Court now turns to the substance and propriety of Doe's Petition. Assuming, however, that all allegations in the Petition are true, this Court is still unable to provide the Petitioner with the requested relief. First, this Court does not have the authority to dismiss the charges filed against the Petitioner. Second, the Petitioner is not entitled to relief because he has not exhausted the administrative remedies available to him.

1

Authority to Dismiss All Charges

This Court will not construe its authority under the LEOBOR to be greater than that which the statute clearly outlines. Because the authority to summarily dismiss charges for procedural violations is not enumerated among this Court's powers in the LEOBOR statute, this Court is without jurisdiction at this juncture to dismiss the CPD's LEOBOR proceeding against Petitioner. Thus, assuming arguendo that Major Catlow heard evidence prior to the LEOBOR hearing or the CPD failed to timely select a third LEOBOR hearing committee member, this Court is not empowered to dismiss the charges against the Petitioner. If the Petitioner feels that his rights have been violated, the statute provides that he may apply to the Superior Court for an

[6] Section 42-28.6-4(e) provides, in relevant part, "[t]he charging law enforcement agency shall provide the law enforcement officer with the name of one active or retired *law enforcement officer* to serve on the hearing committee." Sec. 42-28.6-4(e) (emphasis added). Section 42-28.6-1(1) defines a "law enforcement officer" as "any permanently employed city or town police officer, [or] *state police officer*[.]" Therefore, the LEOBOR statute explicitly allows State Police Officers, such as Major Catlow, to serve on LEOBOR hearing committees.

order directing the charging law enforcement agency to show cause why the right should not be afforded. Sec. 42-28.6-14(b); In re Sabetta, 661 A.2d at 80.

2

Failure to Exhaust Administrative Remedies

Ultimately, the Petition is premature because Doe has not exhausted the administrative remedies available to him. Section 42-28.6-12(a) provides that:

> "Appeals from all decisions rendered by the hearing committee shall be to the superior court in accordance with §§ 42-35-15 and 42-35-15.1. For purposes of this section, the hearing committee shall be deemed an administrative agency and its final decision shall be deemed a final order in a contested case within the meaning of §§ 42-35-15 and 42-35-15.1." Sec. 42-28.6-12(a).

In accordance with § 42-35-15(a), "any person . . . who has *exhausted all administrative remedies available to him* or her within the agency, and who is *aggrieved by a final order in a contested case* is entitled to judicial review[.]" Sec. 42-35-15(a) (emphasis added); see R.I. Emp't Sec. Alliance, Local 401, S.E.I.U., AFL-CIO v. State, Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002) (citing Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992)) (holding that "[i]t is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in court"); Rodrigues v. R.I. Dep't of Educ., 697 A.2d 1077, 1079 (R.I. 1997) (dismissing plaintiff's claim without prejudice because he failed to exhaust all administrative remedies).

Exhaustion of administrative remedies, however, is not always required. Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1266. In Doe ex. rel. His Parents and Natural Guardians, our Supreme Court has found that exhaustion of administrative remedies is not required when,

> "(1) the administrative process would be 'futile or inadequate;' (2)

> the administrative process would 'waste resources, and work severe or irreparable harm on the litigant;' (3) the issues raised 'involve purely legal questions;' or (4) the agency prevents 'the litigant from pursuing [his or] her claim at the administrative level.'" Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1266 (quoting Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 190–91 (1st Cir. 1993)).

Nevertheless, the Court has "emphasize[d] that the reviewing court should exercise the power to review interlocutory rulings of administrative agencies sparingly in order to avoid inundation by preliminary issues that may ultimately be resolved or become moot in the course of litigation at the administrative level." Owners-Operators Indep. Drivers Ass'n of Am. v. State, 541 A.2d 69, 72-73 (R.I. 1988). Accordingly, the determinative issue at bar is whether the facts pleaded in Doe's Petition suffice to invoke one of the applicable exceptions to the exhaustion requirement. Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1267.

a

Futility/Inadequacy

With respect to the futility prong, Petitioner argues that he "should not be forced to appear before a hearing committee which [he] contends is fatally flawed as a result of actions taken by both the Cranston Police Department and the RISP in violation of the LEOBOR statute." (Pet'r's Mem. in Supp. of Pet'r's Obj. to the RISP's Mot. to Dismiss, 11). Regarding the futility of exhausting administrative appeals, "[a] plaintiff does not have to exhaust administrative remedies if [he or] she can show that the agency's adoption of an unlawful general policy would make resort to the agency futile . . . ." Rose v. Yeaw, 214 F.3d 206, 210-11 (1st Cir. 2000). Similarly, a plaintiff need not meet the exhaustion requirement if the agency cannot grant adequate relief. Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 61 (1st Cir. 2002)

This Court has not been presented with any evidence which indicates members of the

LEOBOR committee have adopted an unlawful policy or any policy that would prejudice the rights of the Petitioner. This Court notes that "a hearing committee, convened pursuant to the Officers' Bill of Rights, is granted broad powers to investigate allegations of police misconduct, hold hearings, and issue decisions that affect the individual rights of permanently appointed law enforcement officers." In re Denisewich, 643 A.2d at 1197. Therefore, it is clear that the LEOBOR hearing committee has the authority to craft "some other satisfactory remedy, and, in the event that no resolution is reached, 'the administrative process, at the very least, should facilitate the development of a useful record." Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1269 (quoting Frazier, 276 F.3d at 62). Accordingly, Petitioner's argument fails: he may not simply bypass the administrative process by alleging illegality or because he has requested a remedy which the committee is not empowered to provide. Id.; see Frazier, 276 F.3d at 61 (concluding that exhaustion of administrative remedies is advantageous even though the administrative process does not offer the specific form of relief sought by the plaintiff).

b

Irreparable Harm

Our Supreme Court has found that "[t]he exception for irreparable harm 'is to be sparingly invoked.'" Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1269 (citing Rose, 214 F.3d at 212). Here, there is simply no indication that permitting the LEOBOR hearing committee to decide the case would irreparably harm the Petitioner. Aside from allegations of illegality, the Petitioner has not provided this Court with any evidence that the LEOBOR hearing committee cannot hear and consider the case at hand. Furthermore, the Petitioner will have the opportunity to appeal the hearing committee's decision to the Superior Court, but only after the committee has rendered a final decision. Sec. 42-28.6-12(a).

c

Purely Legal Questions

Petitioner argues that the LEOBOR hearing committee cannot provide him with his requested relief and thus the Superior Court has jurisdiction. However, as the First Circuit concluded in Frazier, "a party must exhaust a mandatory administrative process even if the precise form of relief sought is not available in the administrative venue." Frazier, 276 F.3d at 62. The court found that such a policy "makes perfect sense" because "the administrative process, at the very least, should facilitate the development of a useful record (and, thus, assist in the informed disposition of any subsequent litigation)." Id. The court also cautioned that to allow a plaintiff to pursue his or her claim without first exhausting the administrative process "would allow a plaintiff to bypass the administrative procedures merely by crafting [his or] her complaint to seek relief that [the agency was] powerless to grant." Id. at 63. Such a policy, the court stated, "would subvert . . . the very existence of a mandatory exhaustion requirement [.]" Id.

Here, requiring that the Petitioner exhaust the available administrative remedies is beneficial to all parties involved because it creates a useful record for any further appeals. Additionally, the General Assembly enacted the LEOBOR statute for the express purpose of "protect[ing] police officers from any impairment of their rights when their conduct is questioned by a law enforcement agency with respect to a noncriminal matter." Providence Lodge No. 3, Fraternal Order of Police, 951 A.2d at 504. Thus, the LEOBOR statute is designed so as to provide police officers with additional layers of procedural protection. "Here the legislature clearly intended the path of review to be other than the Superior Court." Potter v. Chettle, 574 A.2d 1232, 1234 (R.I. 1990). As such, the Petitioner is obligated to follow the

outlined procedure for review and cannot circumvent the LEOBOR hearing. See id.

d

Agency Prevention

Reading between the lines, Petitioner argues that the involvement of the RISP is somehow prejudicial to his cause. Thus, Petitioner seeks to bypass the administrative process and proceed directly to Superior Court because he regards the LEOBOR hearing committee as unfit. The First Circuit has held that "'[e]xhaustion is not normally required where the agency has prevented the litigant from pursuing [his or] her claim at the administrative level.' Prevention in this context has been interpreted as an agency's 'unwilling[ness] to provide any further . . . proceedings to exhaust.'" Doe ex rel. His Parents and Natural Guardians, 899 A.2d at 1269 (quoting Pihl, 9 F.3d at 190–91 and Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 775 (1st Cir. 1981). However, the Petitioner's own actions—the within suit—are preventing the hearing committee from hearing his claim at the administrative level. Accordingly, this Court finds no evidence that the hearing committee has prevented the Petitioner from pursuing his claim.

e

Dismissal of Miscellaneous Petition as to All Respondents

This Court is "mindful that it is generally inadvisable to grant summary judgment or dismiss a pleading as to a non-moving co-[respondent] since the [petitioner] seemingly would not have an opportunity to argue against the non-movant's position[;] nonetheless, [this Court] believe[s] this is an exceptional and appropriate circumstance to do so." Washington Petroleum & Supply Co. v. Girard Bank, 629 F. Supp. 1224, 1230 (M.D. Pa. 1983); see Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 22 (1st Cir. 2014) (holding that "[s]ua sponte dismissals

are strong medicine, and should be dispensed sparingly"). Here, "it is crystal clear that the [petitioner] cannot prevail and that amending the complaint would be futile[.]" Garayalde-Rijos, 747 F.3d at 23; see Green v. Concord Baptist Church, 313 F. App'x 335, 336 (1st Cir. 2009) (holding that "where it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile then . . . a [sua sponte] dismissal may stand"). Furthermore, dismissal of the Petition, as to all Respondents, is appropriate because 1) Doe's Petition as a whole is premature in light of the fact that he has not exhausted all administrative remedies and 2) Doe requests that the Court dismiss all of the charges when the Court does not have the authority to do so.

IV

Conclusion

For the reasons set forth above, Doe's motion to dismiss all charges is denied and the RISP's motion to dismiss is granted. This Court further dismisses Doe's Petition as to the remaining parties, including the CPD and Mayor Fung. Counsel shall submit appropriate orders for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**John Doe v. Cranston Police Department, et al.**
CASE NO:	**PM-14-3369**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 10, 2015**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**William J. Conley, Jr., Esq.**
For Defendant:	**Vincent F. Ragosta, Jr., Esq.** **Danica A. Iacoi, Esq.**