**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: November 18, 2016)**

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| **RONALD N. RENAUD,** | : | |
| **Plaintiff,** | : | |
| **v.** | : | **C.A. No. PC-2016-0910** |
| **GINA RAIMONDO, Alias, individually and in her Capacity as Governor of the State of Rhode Island; MICHAEL DIBIASE, Alias, individually and in his Capacity as Director, Department of Administration of the State of Rhode Island; and THE STATE OF RHODE ISLAND,** | : | |
| **Defendants.** | : | |

**DECISION**

**SILVERSTEIN, J.** Before the Court is the Defendants'—Gina Raimondo, individually and in her capacity as Governor of the State of Rhode Island; Michael DiBiase, individually and in his capacity as Director of the Department of Administration of the State of Rhode Island; and the State of Rhode Island (Defendants)—Motion to Dismiss Plaintiff Ronald N. Renaud's (Renaud) First Amended Complaint pursuant to Rule 12 of the Rhode Island Superior Court Rules of Civil Procedure. The Court has jurisdiction pursuant to G.L. 1956 § 8-2-14.

**I**

**Facts and Travel**

In June of 2007, Renaud was hired as the Executive Director of the Department of Administration (DOA) of the State of Rhode Island. First Am. Compl. at 2, ¶ 1. As DOA's Executive Director, Renaud was a classified state employee with permanent status. Id. at ¶ 3.

Renaud served as the DOA's Executive Director until March 20, 2015, when Defendant DiBiase informed him that his position had been abolished and he had been laid off. Id. at ¶ 5. On February 29, 2016, Renaud initiated this lawsuit asserting that he was unlawfully terminated.

Following Renaud's initial Complaint in February of 2016, Defendants moved to dismiss. After several months, during which the parties engaged in considerable motion practice, Renaud filed his First Amended Complaint on September 1, 2016. Again, Defendants moved to dismiss. The Court heard arguments on the Motion to Dismiss the First Amended Complaint on October 5, 2016. After that hearing, the Court accepted supplemental memoranda from both parties.

## II

## Standard of Review

"'[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint.'" R.I. Emp't Sec. Alliance, Local 401 v. State, Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002) (hereinafter R.I. Emp't) (per curiam) (alteration in original) (quoting R.I. Affiliate, ACLU v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). In testing a complaint's sufficiency, the Court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiff[].'" Id. (quoting St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996)). "[N]o complaint will be deemed insufficient unless it is clear beyond a reasonable doubt that the plaintiff will be unable to prove his right to relief[.]" Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 12, 227 A.2d 582, 584 (1967). Accordingly, a motion to dismiss "should not be granted 'unless it appears to a certainty that the plaintiff[] will not be entitled to relief under any set of facts which might be proved in support of [his] claim.'" R.I. Emp't, 788 A.2d at 467 (internal alterations omitted) (quoting St. James Condo Ass'n, 676 A.2d at 1346).

## III

## Discussion

Renaud's primary claim in his First Amended Complaint is that he was wrongfully terminated due to his political affiliation. This claim is listed as part 7(a) of Count I in his First Amended Complaint. Defendants argue that the Court should dismiss Renaud's First Amended Complaint because of his failure to properly exhaust his administrative remedies under G.L. 1956 § 36-4-42, which pertains to state employees, such as Renaud, who allege discrimination on the basis of political beliefs. According to Defendants, Renaud's claim should first have been brought to the Personnel Appeal Board, not to this Court. Defendants contend that taking Renaud's allegations as true—specifically that he was laid off and his job was abolished due to his political affiliation—he failed to first exhaust his administrative remedies with the Personnel Appeal Board and that, as a result, this Court should dismiss Renaud's claim for wrongful termination.

Renaud responds to this contention with two arguments. First, Renaud maintains that he did not have to bring his claim with the Personnel Appeal Board; doing so was permissive, he avers, not mandatory. Essentially, Renaud argues that after he was laid off he had two distinct options: appeal to the Personnel Appeal Board or bring suit in this Court. Renaud believes that is the case because § 36-4-42 provides that aggrieved state employees "may" appeal to the Personnel Appeal Board for relief. Defendants contend that the use of the word "may" does not allow Renaud to circumvent the Personnel Appeal Board.

Second, Renaud asserts that he did not need to seek a remedy with the Personnel Appeal Board because doing so would have been futile. According to Renaud, appealing to the Personnel Appeal Board would have been futile because (a) the Personnel Appeal Board, which

is comprised of members appointed by the Governor, was biased against him and would therefore be incapable of rendering an impartial decision in his favor and (b) the Personnel Appeal Board lacked the authority to restore Renaud to a position that had been abolished. In response, Defendants contend that the Personnel Appeal Board was perfectly capable of rendering a decision in Renaud's case. According to Defendants, the mere allegation of potential bias against a government board made up of appointees is insufficient to invoke the futility exception to the requirement that a plaintiff first exhaust his administrative remedies prior to seeking judicial relief. Moreover, Defendants argue that the Personnel Appeal Board is tasked with the authority to provide precisely the remedy Renaud sought.

In addition to maintaining that he did not need to first seek a remedy with the Personnel Appeal Board, Renaud alleges myriad claims throughout his First Amended Complaint. Although divided into two counts that generally allege wrongful termination, Renaud's First Amended Complaint also contains allegations that Defendants violated numerous constitutional provisions. Specifically, in the introductory paragraph to his First Amended Complaint, Renaud states violations of the First, Sixth, and Fourteenth Amendments of the United States Constitution as well as violations of Article I, Sections 5, 21, and 24, Article II, Section 7,[1] and Article IX, Section 2 of the Rhode Island Constitution. With a passing reference to 42 U.S.C. § 1983, Renaud appears to allege that Section 1983 is the mechanism that provides him with relief for the alleged violations of the federal constitution. These allegations all seem to be set alongside Count II of his First Amended Complaint, which generally alleges that Defendants violated Renaud's constitutional right to continued employment.

[1] There is no such provision in the Rhode Island Constitution.

Finally, in parts 7(b) through (d) of Count I, Renaud alleges various forms of a civil conspiracy. According to Renaud, Defendants conspired to lay him off and abolish the position of Executive Director based on his political affiliation.

**A**

**Failure to Exhaust Administrative Remedies**

Generally, "a plaintiff first must exhaust his administrative remedies before seeking judicial review of an administrative decision." Almeida v. Plasters' & Cement Masons' Local 40 Pension Fund, 722 A.2d 257, 259 (R.I. 1998) (per curiam) (citing Burns v. Sundlun, 617 A.2d 114, 117 (R.I. 1992)). "It is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in court." R.I. Emp't, 788 A.2d at 467. The exhaustion requirement "serves two purposes: '(1) it aids judicial review by allowing the parties and the agency to develop the facts of the case, and (2) it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.'" Id. at 467 (internal quotation marks omitted) (quoting Burns, 617 A.2d at 117).

A plaintiff's failure to exhaust his administrative remedies may warrant dismissal of his complaint for lack of subject matter jurisdiction. Almeida, 722 A.2d at 259; Jacob v. Burke, 110 R.I. 661, 673, 296 A.2d 456, 463 (1972) (explaining that "when a litigant has failed to exhaust his administrative remedies the trial justice, may, in his discretion, dismiss an entire complaint for lack of subject matter jurisdiction"). Indeed, the Rhode Island Supreme Court "has 'indicated [its] strong preference for proceeding with an administrative procedure through judicial review as opposed to instituting a separate action . . . .'" Richardson v. R.I. Dep't of Educ., 947 A.2d

253, 259 (R.I. 2008) (quoting Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865, 870 (R.I. 1998)).

However, although the exhaustion requirement may result in dismissal for lack of subject matter jurisdiction, see, e.g., R.I. Emp't, 788 A.2d at 469, the Rhode Island Supreme Court has "recognized exceptions to the exhaustion requirement—for example, when an appeal to an administrative review board would be futile . . . ." Almeida, 722 A.2d at 259 (citing M.B.T. Constr. Corp. v. Edwards, 528 A.2d 336, 337-38 (R.I. 1987)). The futility exception has been applied in cases where an administrative agency lacks the authority to do what the plaintiff requests, such as invalidating a zoning ordinance or declaring a statute unconstitutional. See, e.g., M.B.T. Constr. Corp., 528 A.2d at 337-38; Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978). Barring the applicability of an exception to the exhaustion requirement, such as futility, the Court may dismiss a claim for lack of subject matter jurisdiction when a plaintiff fails to exhaust the administrative remedies available to him or her. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259; Burns, 617 A.2d at 117.

Here, according to his First Amended Complaint, Renaud was a classified state employee with permanent status. First Am. Compl. at 2, ¶¶ 1, 3. Renaud's status in this respect entitled him to certain rights under the Merit System Act, codified at chapter 4 of Title 36 of the Rhode Island General Laws. Specifically, pursuant to § 36-4-42:

> "Any state employee with . . . permanent status who feels aggrieved by an action of an appointing authority resulting in a demotion, suspension, layoff, or dismissal or by any personnel action which an appointing authority might take which causes the person to believe that he or she had been discriminated against because of his or her . . . political . . . beliefs, may, within thirty (30) calendar days of the mailing of the notice of that action, appeal in writing to the personnel appeal board for a review or public hearing." (Emphasis added.).

The Personnel Appeal Board "is an independent agency of the state designed to protect the interests of state employees under the merit system." Dep't of Corr. of State of R.I. v. Tucker, 657 A.2d 546, 549 (R.I. 1995). Furthermore, the General Assembly has specifically mandated that "[t]he [P]ersonnel [A]ppeal [B]oard shall hear appeals: . . . [b]y any person who holds the belief that he or she has been discriminated against because of his or her . . . political . . . beliefs in any personnel action." Section 36-3-10(a)(3); see also § 36-3-10(b). If a state employee is dissatisfied with the Personnel Appeal Board's determination, he or she may then appeal to this Court for relief through the normal course as provided in the Administrative Procedures Act. See G.L. 1956 § 42-35-15.

Section 36-4-42 provided Renaud with precisely the remedy he now seeks. As a state employee with permanent status who alleges that he was laid off because of his political affiliation, Renaud fits squarely within the language of § 36-4-42. The Personnel Appeal Board exists, in part, to hear such a claim. See § 36-3-10(a)(3). Similarly, his claim that the position of Executive Director was abolished to remove him from state employment arises under § 36-4-42 because it alleges a "personnel action . . . which causes the person to believe that he or she had been discriminated against because of his . . . political . . . beliefs." Even if Defendants had abolished the position of Executive Director due to Renaud's political beliefs, Renaud's remedy was first with the Personnel Appeal Board. See § 36-3-10(a)(3).

According to the information and allegations in his First Amended Complaint, Renaud took no action to seek relief through the administrative procedure outlined in § 36-4-42. In failing to appeal his layoff or job abolition through the administrative avenue of relief available to him, Renaud failed to exhaust his administrative remedies as required by § 36-4-42. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259.

Renaud was required to appeal to the Personnel Appeal Board even though § 36-4-42 uses the word "may." See § 36-4-42. When interpreting a statute, the Court looks first to its plain meaning. Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 328 (R.I. 2012). "'It is well settled that when the language of a statute is clear and unambiguous, th[e] Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 796 (R.I. 2005) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). "[W]hen [the Court] examine[s] an unambiguous statute, 'there is no room for statutory construction and [it] must apply the statute as written.'" Id. (quoting State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)).

While it appears that our Supreme Court has not yet had the occasion to address the use of "may" in § 36-4-42, it has indicated that the use of "may" elsewhere in the Merit System Act does not allow a plaintiff to circumvent the exhaustion requirement. See Mikaelian v. Drug Abuse Unit, 501 A.2d 721, 725-26 (R.I. 1985). In Mikaelian, the Rhode Island Supreme Court held that the plaintiff, a state employee covered both by the Merit System Act and a collective bargaining agreement, failed to properly exhaust his administrative remedies and affirmed the dismissal of his case. Id. at 726. The Court determined that the plaintiff had two remedies—one under his collective bargaining agreement and another under § 36-4-40. Id. As the Court stated, in addition to his remedy under the collective bargaining agreement, "[the] plaintiff, as a merit-system employee, had the option of proceeding through the appeal mechanism set forth in . . . §§ 36-3-10 and 36-4-40." Id. Because the plaintiff neither sought relief through a collectively-bargained grievance procedure nor appealed to the Personnel Appeal Board under § 36-4-40, the Court found that he "had not exhausted either of the administrative remedies open to him." Id.

Thus, the use of the word "may" in § 36-4-40 did not relieve the plaintiff of the requirement that he first seek his administrative remedy with the Personnel Appeal Board before seeking judicial relief. See id.

The same rule applies here: the use of the word may in § 36-4-42 does not relieve Renaud of the requirement that he first exhaust his administrative remedy with the Personnel Appeal Board. See id. Like the plaintiff in Mikaelian, Renaud is a classified state employee covered by the Merit System Act. See 501 A.2d at 725-26; see also § 36-4-42; First Am. Compl. at 2, ¶¶ 1, 3. Just as the use of the word "may" in § 36-4-40 did not allow the plaintiff in Mikaelian to circumvent the administrative process, the use of the word "may" in § 36-4-42 does not allow Renaud to circumvent the Personnel Appeal Board and come directly to this Court. See Mikaelian, 501 A.2d at 725-26. Thus, although the use of the word "may" in § 36-4-42 implies a sense of permissiveness, Renaud had to first exhaust his administrative remedy with the Personnel Appeal Board. See id. at 726. Renaud had an administrative remedy available to him; he elected not to exhaust it.[2] See id. The use of the word "may" does not relieve Renaud of that requirement.

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[2] In addition, Renaud likely had an administrative remedy available to him pursuant to § 36-4-38, entitled "Dismissal." Under § 36-4-40,

> "Any person with . . . permanent status who feels aggrieved by an action of the personnel administrator may . . . make a request in writing for an appeal hearing to the administrator of adjudication for the department of administration, and be heard within fourteen (14) calendar days of receipt of the appeal request."

If that person then "feels aggrieved by a decision of the administrator of adjudication [he] may, within thirty (30) calendar days of the rendering of a decision, request in writing for the personnel appeal board to review the decision or conduct a public hearing." Sec. 36-4-41. As is the case with his failure to seek administrative relief under § 36-4-42, Renaud's First Amended Complaint is devoid of any information that he took action pursuant to this procedural route. See Mikaelian, 501 A.2d at 725-26. Again, Renaud failed to first exhaust his administrative

Moreover, although futility is a recognized exception to the exhaustion requirement, it does not apply here. See, e.g., M.B.T. Constr. Corp., 528 A.2d at 337-38. First, unlike the plaintiff in M.B.T. Constr. Corp., the Personnel Appeal Board had the power to grant Renaud the relief he now seeks. See id. Section 36-4-42 provides, in pertinent part:

> "[T]he personnel appeal board shall render a decision . . . which may confirm or reduce the demotion, suspension, layoff, or dismissal of the employee or may reinstate the employee and the board may order payment of part or all of the salary to the employee for the period of time he or she was demoted, suspended, laid off, or dismissed. The decision of the board shall be final and binding upon all parties concerned, and upon the finding of the personnel administrator, or upon appeal, in favor of the employee, the employee shall be forthwith returned to his or her office or position without loss of compensation, seniority, or any other benefits he or she may have enjoyed, or under such terms as the appeal board shall determine. The employee who is returned to his or her office or position by the appeal board following a review or public hearing shall be granted by the state of Rhode Island counsel fees, payable to his or her representative counsel, of fifty dollars ($50.00) for each day his or her counsel is required to appear before the appeal board in the behalf of the aggrieved employee."

After a hearing, the Personnel Appeal Board had the authority to reinstate Renaud without loss of compensation. Thus, Renaud's remedy was within the power of the Personnel Appeal Board to award. See id.; see, e.g., Disano v. Personnel Appeal Bd., No. C.A. 95-4754, 1997 WL 839869, at *4 (R.I. Super. Jan. 8, 1997) (Sheehan, J.) (affirming decision of the Personnel Appeal Board that reinstated a laid-off state employee to a job that had been abolished); Romano v. Pare, No. C.A. 83-3020, 1984 WL 559244, at *1-2 (R.I. Super. Nov. 30, 1984) (Gibney, J.) (denying injunctive relief to reinstate a state employee whose position had been abolished because that employee had an adequate remedy with the Personnel Appeal Board). Because the Personnel Appeal Board had the authority to do what Renaud seeks, appealing his layoff to the Personnel Appeal Board would not have been futile. See M.B.T. Constr. Corp., 528 A.2d at 337-38.

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remedies in accordance with the well-settled requirement that he do so. See R.I. Emp't, 788 A.2d at 467; Mikaelian, 501 A.2d at 725-26.

Furthermore, appealing to the Personnel Appeal Board would not have been futile because of an alleged bias amongst its members. Renaud's argument on this issue is twofold. First, he contends that the Personnel Appeal Board was unable to render an impartial decision in his case because it is subordinate to Defendants' control, meaning that the members were biased against him. Second, he alleges that seeking relief from the Personnel Appeal Board was futile because its members are appointed by the Governor. In support of these contentions, Renaud cites to two cases: O'Neill v. Baker, 210 F.3d 41 (1st Cir. 2000) and Duhani v. Town of Grafton, 52 F. Supp. 3d 176 (D. Mass. 2014). However, neither of these cases supports the argument that an appeal to the Personnel Appeal Board would have been futile; rather, these cases focus on the requirement of a pretermination hearing for state employees. In fact, the plaintiffs in both of these cases first exhausted their respective administrative remedies under the relevant Massachusetts civil service protections. O'Neill, 210 F.3d at 45-46; Duhani, 52 F. Supp. 3d at 180-81.

Here, Renaud had pretermination protections available to him under the Merit System Act. In at least two ways, he had the ability to challenge his job abolition or layoff through the administrative process. For example, as § 36-4-38 provides, "[a]ny removal or separation of an employee from the classified service not otherwise provided for in this chapter shall be deemed to be a dismissal." If Renaud felt that his job abolition or layoff was the result of wrongful action on the part of Defendants, thereby constituting a dismissal, he had the ability to challenge it through the administrative process, starting with an appeal to the DOA's personnel administrator. See id. After challenging his situation with the DOA's personnel administrator, if he remained dissatisfied, Renaud could have sought an appeal with the administrator of adjudication for the DOA. See id. From there, Renaud could have appealed to the Personnel

Appeal Board. See § 36-4-41. Alternatively, as previously discussed, Renaud had an entirely separate remedial course available to him: he could have challenged his predicament directly to the place he elected not to go prior to filing the instant lawsuit—the Personnel Appeal Board. See § 36-4-42 (providing a remedy for personnel action taken on the basis of a state employee's political beliefs). Either of these options provided Renaud with an administrative remedy necessary to fulfill the pretermination requirements discussed in O'Neill, 210 F.3d 41 and Duhani, 52 F. Supp. 3d 176.

Addressing Renaud's futility arguments together, the Court notes that it is true that the members of the Personnel Appeal Board are appointed by the Governor, see Tucker, 657 A.2d at 549; however, that fact alone does not invoke the futility exception. As applied by our Supreme Court, the futility exception covers the situations when an administrative remedy is inadequate because the agency is powerless to grant one. M.B.T. Constr. Corp., 528 A.2d at 337-38 (finding futility because the zoning board could not invalidate a zoning ordinance); Kingsley, 120 R.I. at 374, 388 A.2d at 359 (finding futility because the agency could not declare a statute unconstitutional). Here, as noted above, the Personnel Appeal Board had the power to grant Renaud an adequate remedy; yet, he elected not to seek it. See § 36-4-42; Disano, 1997 WL 839869, at *4; Romano, 1984 WL 559244, at *1-2. The Personnel Appeal Board is mandated by statute to hear the type of claim Renaud has alleged. See § 36-3-10(b). The futility exception is a limited one and considering our Supreme Court's "strong preference for proceeding with an administrative procedure through judicial review as opposed to instituting a separate action," Richardson, 947 A.2d at 259, this Court declines to apply it here.

In the case before the Court, there is no allegation that Renaud took any administrative action to challenge his layoff. Renaud had clear administrative remedies available to him with

the DOA's personnel administrator or the Personnel Appeal Board, but did not pursue it. See §§ 36-4-40, 36-4-42. Therefore, Renaud has failed to exhaust his administrative remedies, and the Court finds that it lacks subject matter jurisdiction to hear his claim for wrongful termination. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259; Jacob, 110 R.I. at 673, 296 A.2d at 463.

**B**

**Constitutional Claims**

In addition to asserting a claim for wrongful termination for his political affiliation, Renaud alleges a host of violations of his constitutional rights. At the outset, the Court re-iterates that its job in considering a motion to dismiss is to test the sufficiency of the complaint. R.I. Emp't, 788 A.2d at 467. In doing so, the Court resolves all doubts in the plaintiff's favor. Id. However, the plaintiff must still allege some "'set of facts which might be proved in support of [his] claim.'" Id. (internal alterations omitted) (quoting St. James Condo Ass'n, 676 A.2d at 1346). When the plaintiff fails to do so, he has failed to state a claim for which relief can be granted, and the Court may accordingly dismiss. Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008).

Renaud has not alleged facts necessary to properly state a claim upon which relief can be granted. See id. Although the Court adheres to a liberal notice-pleading standard when reviewing a motion to dismiss for failure to state a claim, Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 422-23 (R.I. 2014), and the Court is instructed that "[a]ll pleadings shall be [] construed as to do substantial justice," see Super. R. Civ. P. 8(f), here Renaud failed to allege facts that show a violation of his federal and state constitutional rights. The Court finds that the generalized list of constitutional rights Renaud provided in the introductory section of his

First Amended Complaint fails to state a claim for which the law provides relief. See Super. R. Civ. P. 12(b)(6). A broad-based conclusory assertion of federal and state constitutional violations, without more, is insufficient to state a claim for relief. See Doe ex rel. His Parents & Natural Guardians v. E. Greenwich Sch. Dep't, 899 A.2d 1258, 1262 n.2 (R.I. 2006) (noting that "[a]llegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true" and that "'sweeping legal conclusions are not admitted' for the purposes of reviewing a Super. R. Civ. P. 12(b)(6) motion") (quoting Robert B. Kent et al., R.I. Civil Procedure § 12:9, III–44 (West 2006)). Therefore, "'it appears to a certainty that [Renaud] will not be entitled to relief under any set of facts which might be proved in support of [his] claim.'" R.I. Emp't, 788 A.2d at 467 (quoting St. James Condo Ass'n, 676 A.2d at 1346).

Moreover, even when reviewing these allegations with the most liberal of eyes, the Court notes that the introductory allegations and Count II of the First Amended Complaint should also be dismissed for Renaud's failure to his exhaust administrative remedies. Assuming he had alleged a set of facts that could have stated a claim under the law, he still failed to exhaust his administrative remedies. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259. Under Count II and the introductory paragraph of his First Amended Complaint, any due process deficiency he has alleged with respect to his constitutionally protected interest in continued employment would have been cured by appealing to the Personnel Appeal Board as he was required to do. See § 36-4-42; Mikaelian, 501 A.2d at 725-26; see also Duhani, 52 F. Supp. 3d at 181-83. As belabored above, the array of allegations set forth in his First Amended Complaint regarding Renaud's claim of wrongful termination should have been appealed to the Personnel Appeal Board. See Mikaelian, 501 A.2d at 725-26. Therefore, Count II of Renaud's First

Amended Complaint, including the constitutional violations in the introductory paragraph, is dismissed. Palazzo, 944 A.2d at 149-50; R.I. Emp't, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

For purposes of clarity, at this juncture, the Court has dismissed both part 7(a) of Count I and Count II of Renaud's First Amended Complaint for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted, respectively.

### C

### Civil Conspiracy

Rounding out the bevy of allegations included in Renaud's two-count First Amended Complaint is a claim of civil conspiracy. Renaud alleges that his layoff was the result of a civil conspiracy among all of the Defendants to deprive him of his statutory and constitutional rights. Defendants argue that this claim should be dismissed because, in order for the Court to find a conspiracy, there must first be a finding of an underlying tort. Defendants contend that the Court cannot make that initial finding and must therefore dismiss the conspiracy claim.

To the extent that such a claim needed to have been brought before the Personnel Appeal Board, this claim is dismissed. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259; Mikaelian, 501 A.2d at 725-26. However, assuming this Court possessed subject matter jurisdiction to hear Renaud's civil conspiracy allegation, the Court finds that he has failed to state a claim for which relief can be granted.

Although Rhode Island law recognizes civil conspiracy as a valid claim for relief, "civil conspiracy is not an independent basis of liability. It is a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'" Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)). Thus, to

survive a motion to dismiss, a plaintiff's complaint must set forth some underlying intentional tort theory onto which a claim for civil conspiracy can attach. See id.

Here, Renaud's First Amended Complaint does not meet that standard. Although Renaud asserts that Defendants wantonly discriminated against him based on his political affiliation, the underlying claims regarding wrongful termination were not brought at the administrative level with the Personnel Appeal Board. See § 36-4-42; Mikaelian, 501 A.2d at 725-26. With no underlying counts onto which a civil conspiracy claim can be layered, Renaud's assertion of civil conspiracy is a claim for which the law provides no relief. See Super. R. Civ. P. 12(b)(6). With no underlying tort, there is no viable claim for civil conspiracy. See Read & Lundy, Inc., 840 A.2d at 1102. Therefore, the Court dismisses Renaud's claim for civil conspiracy for failure to state a clam for which relief can be granted. See Palazzo, 944 A.2d at 149-50; R.I. Emp't, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

**D**

**Remaining Claims**

To the extent that Renaud's First Amended Complaint contains any remaining allegations of employment discrimination beyond those previously addressed counts for wrongful termination, he had to have first sought relief with the Rhode Island Commission for Human Rights (Commission). Again, the Court notes 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." R.I. Emp't, 788 A.2d at 467. This rule also applies in the context of the Fair Employment Practices Act (FEPA), as outlined in chapter 5 of Title 28 of our General Laws. FEPA "confers upon the [Commission] administrative jurisdiction to hear and resolve claims of unfair employment practices such as employment discrimination." Paulo v. Cooley, Inc., 686 F.

Supp. 377, 382 (D.R.I. 1988). "Under []FEPA, complainants must exhaust their administrative remedies prior to commencing judicial action." Barber v. Verizon New England, Inc., 2005 WL 3479834, at *2 (D.R.I. Dec. 20, 2005); Power v. City of Providence, 582 A.2d 895, 899 (R.I. 1990) (stating that "the 'exhaustion' doctrine would normally ban [the plaintiff's] FEPA claim") (citing Paulo, 686 F. Supp. at 382). To exhaust his administrative remedies, a plaintiff must "fil[e] a written charge detailing the allegedly discriminatory conduct, and submitting to Commission efforts to conciliate or settle the charge." Barber, 2005 WL 3479834, at *2. A plaintiff may only seek judicial relief if, after filing a written charge with the Commission, the Commission allows him or her to opt out of the Commission's informal efforts to settle the claim. Id.; see G.L. 1956 § 28-5-16 (providing that the Commission "shall attempt, by informal methods of conference, persuasion, and conciliation, to induce compliance with [FEPA]").

However, Power instructs, this requirement may be circumvented if seeking relief with the Commission under FEPA would be futile. 582 A.2d at 899. This exception has been applied when the "[C]ommission would be unable to undertake its normal task of 'conference, persuasion, and conciliation' to reach a settlement" and the plaintiff's case presents only a question of law with "no factual record to develop." Id. Still, the general rule is "that the 'exhaustion doctrine [] normally ban[s] [a plaintiff's] FEPA claim," id., and a failure to pursue administrative relief with the Commission may result in dismissal of that plaintiff's claim. See, e.g., Mateo v. Davidson Media Grp. R.I. Stations, LLC, No. PC-2010-2433, 2013 WL 1880370, at *3 (R.I. Super. Apr. 30, 2013) (Stern, J.).

Here, to the extent he alleges employment discrimination beyond that based on political affiliation, Renaud's remedy was with the Commission pursuant to FEPA. As noted above, Renaud's First Amended Complaint mentions nothing of any efforts on his part to seek such

administrative relief prior to filing suit in this Court. His failure to exhaust administrative remedies with the Commission warrants dismissal of the allegations and claims arising under FEPA. See Paulo, 686 F. Supp. at 382. Seeking relief with the Commission would not have been futile, for doing so would have allowed for the Commission to develop a detailed, factual record in favor of reaching an informal solution to the discrimination Renaud allegedly encountered. See id. Therefore, to the extent that any claims regarding employment discrimination exist outside the context of his wrongful termination claim, the Court finds that Renaud failed to exhaust his administrative remedies with the Commission.

## IV

## Conclusion

After reviewing Renaud's First Amended Complaint and "assum[ing] the allegations contained [therein] to be true and view[ing] the facts in the light most favorable to [him]," the Court grants Defendants' Motion to Dismiss the First Amended Complaint. R.I. Emp't, 788 A.2d at 467; Super. R. Civ. P. 12(b)(1), (6). The Court finds that it lacks subject matter jurisdiction to hear Renaud's wrongful termination claim under Count I. See § 36-4-42; R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259. Count II is also dismissed for failure to state a claim for which the law provides relief because Renaud failed to (a) properly allege facts that amount to a violation of any of the numerous constitutional amendments he cites and (b) assuming he stated such a claim, he failed to pursue it with the Personnel Appeal Board. See Palazzo, 944 A.2d at 149-50; R.I. Emp't, 788 A.2d at 467; Super. R. Civ. P. 12(b)(6).

Furthermore, Renaud's claim for civil conspiracy in parts 7(b) through (d) of Count I is dismissed for failure to state a claim upon which relief can be granted. See Palazzo, 944 A.2d at 149-50; Super. R. Civ. P. 12(b)(6). And, to the extent that the allegations included in the First

Amended Complaint amount to a claim for employment discrimination, those claims are also dismissed for lack of subject matter jurisdiction due to Renaud's failure to exhaust his administrative remedies. See R.I. Emp't, 788 A.2d at 467; Almeida, 722 A.2d at 259; Jacob, 110 R.I. at 673, 296 A.2d at 463.

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss Renaud's First Amended Complaint.[3] Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

[3] Following the October 5, 2016 hearing on the instant Motion to Dismiss, Renaud filed a Motion to Amend the First Amended Complaint, a Motion to which Defendants objected. Along with his Motion to Amend, Renaud filed a Second Amended Complaint, which is identical to the First Amended Complaint but for one typographical correction in the introductory paragraph—specifically, he changed "Article II, Section 7" to "Article III, Section 7." See Second Am. Compl. at 1. As previously noted in this Decision, there is no Article II, Section 7 in the Rhode Island Constitution. This Court is mindful of our Supreme Court's instruction to "'liberally allow amendments to the pleadings'" under Rule 15. Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 530 (R.I. 2011) (quoting Medeiros v. Cornwall, 911 A.2d 251, 253 (R.I. 2006)). However, considering that the Second Amended Complaint is identical to the First Amended Complaint, but for a single typographical difference, the Court sees no reason why this Decision would not apply with the same force to the Second Amended Complaint. There is no substantive difference between the two pleadings that would cause this Court to reach a different outcome.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Ronald N. Renaud v. Gina Raimondo, et al.** |
| **CASE NO:** | **PC-2016-0910** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **November 18, 2016** |
| **JUSTICE/MAGISTRATE:** | **Silverstein, J.** |

**ATTORNEYS:**

| | |
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| **For Plaintiff:** | **Gerard M. DeCelles, Esq.** |
| **For Defendant:** | **Chrisanne E. Wyrzykowski, Esq.**<br>**Jennifer S. Sternick, Esq.** |