

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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**Appeal of Inge Bradley – Docket #2011-D-002**  
**New Hampshire Employment Security**  
**June 14, 2012**

The New Hampshire Personnel Appeals Board (Wood, Bonafide and Casey) met in public session on Wednesday, May 23, 2012, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Inge Bradley, an employee of New Hampshire Employment Security. Ms. Bradley, who was represented at the hearing by SEA Grievance Representative Nicholas McGinty, was appealing a March 21, 2011, letter of warning issued to her for allegedly violating Per 1002.04(b)(5) and NHES directive 2030-3. Richard Lavers, Chief Counsel for NH Employment Security, appeared on behalf of the State.

The appeal was heard on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

#### Jointly Filed Exhibits

- A. March 21, 2011 Letter of Warning issued to Inge Bradley (complainant's name redacted)
- B. NH Department of Employment Security Directive 2030-D PR – Sexual Harassment
- C. State of NH Policy on Sexual Harassment

#### Appellant's Exhibits

- 1. 2/19/11 Complaint Email to L. Riccio
- 2. Executive Order 2006-9
- 3. 4/25/11 SEA Steward Email from NHES
- 4. 5/15/12 Robert "Jeff" White Statement
- 5. 5/16/12 Linda Huard Statement
- 6. 5/16/12 Maria Elaina Guthro Statement
- 7. 5/15/12 Tim Ryan Statement

Prior to the hearing on the merits of the appeal, Mr. Lavers submitted the State's Motion in Limine, requesting that the Board issue an order exempting from disclosure to the public any portion of the record that discusses, mentions, or reveals the identify of the individual who complained against Ms. Bradley. The State asked for any pleadings and documents submitted in connection with the appeal be redacted to maintain confidentiality of the complainant. The State also asked for the Board to close the hearing to the public or, in the alternative, to issue an order directing the parties to refrain from making any statement that could reveal the identity of the individual filing the harassment complaint.

After hearing argument by both parties on the Motion in Limine, the Board agreed to accept redacted copies of any documents to replace any documents submitted in connection with the appeal that might identify the individual who filed the complaint against Ms. Bradley. The Board did not close the hearing to the public.

The Board also accepted the following offers of proof:

#### State's Offers of Proof

1. Some time in 2009, Ms. Bradley's supervisor, Sandra Jamak, spoke to her about one of Ms. Bradley's male co-workers, telling the Appellant that the co-worker was uncomfortable with Ms. Bradley's physical proximity to him when they worked together. Ms. Jamak would testify that the Appellant was unaware at that time that she made this individual uncomfortable. Ms. Jamak would testify that she directed the Appellant to keep her distance from this individual, and that the Appellant assured her that it would not happen again.
2. Lisa Riccio, the Human Resources Administrator, would testify that she had received in February 2011 an anonymous email from an employee complaining of sexual harassment. Ms. Riccio would testify that once she was able to identify the complainant, she initiated an investigation. Ms. Riccio would testify that she conducted an investigatory meeting on March 2, 2011; participants at the meeting included Ms. Riccio, Ms. Bradley, Pam Callioras, the Appellant's union steward, and Mr. Lavers, General Counsel for the NH Department of Employment Security. Ms. Riccio would testify that the Appellant was able to guess the identity of the complainant because of the nature of the complaint. Ms. Riccio would testify that the Appellant admitted that she had touched the complainant's head, despite instructions from Ms. Jamak in 2009, to keep her distance from this employee. Ms. Riccio would testify that she did not feel the need to conduct a further investigation or involve any other employees since the Appellant had admitted to the conduct that was alleged.

#### Appellant's Offers of Proof

1. The Appellant would testify that she has poor eyesight, and that the nature of her work often requires her to work in very close proximity to co-workers when she is trying to observe what is

displayed on their computer screens. The Appellant would testify that she tells employees that she has to get close to them in order to see the work is being performed.

2. The Appellant would testify that she remembers a discussion that she had in 2009, with her supervisor, Sandra Jamak, about a male employee who had complained that the Appellant was getting too close to him. The Appellant would testify that the 2009 discussion with Ms. Jamak was not a formal meeting and she received no formal counseling. The Appellant would testify that she continued to interact with the male employee as she had previously, that she was never told that there were concerns that her behavior might be considered harassment, and that the agency did nothing at that time to adjust her working relationship with the male employee, or to limit their interactions in any way. The Appellant received no written warning, no memo of counsel, no corrective action plan and no additional training.
3. The Appellant would testify that the male co-worker who was the subject of the discussion with Ms. Jamak in 2009, had left the work unit as a CO I to work in another area for a time, and that he had returned as a CO III. The Appellant would testify that they had personal discussions with one another, that they socialized with one another after work as part of a group from the office, that the male co-worker sought her out from time to time, that he borrowed cigarettes and money from her, and that the male co-worker never gave the Appellant any indication that he was uncomfortable around her, or that there was any sort of problem between them.
4. The Appellant would testify that at the March 2, 2011, investigatory meeting, she said that she did not recall having touched the complainant's head, but admitted that she might have done so. The Appellant would testify that she had wanted NH Employment Security to conduct a more thorough investigation and speak with others from the work unit, because she believed the agency would learn from those witnesses that they had seen nothing inappropriate between the Appellant and the complainant, and they never had any indication that the male co-worker was uncomfortable around the Appellant.

After carefully considering the evidence, argument and offers of proof, the Board made the following Findings of Fact and Rulings of Law:

1. The Appellant, Inge Bradley, works for the NH Department of Employment Security as a Certifying Officer III.
2. In 2009, there was a discussion between Ms. Bradley and her supervisor, Sandra Jamak, about the Appellant's interactions with a male co-worker. The male employee had gone to his own supervisor to complain about the Appellant. His supervisor then spoke to Ms. Bradley's supervisor, Sandra Jamak. Ms. Jamak reportedly told the Appellant to keep her distance from the male co-worker. Apart from the parties' offers of proof, however, there was no evidence describing the meeting, the nature of the discussion, or any specific instructions that the Appellant might have received regarding

interactions with the male co-worker who had complained about her. Following that meeting, the Appellant never received written counseling, a written warning, a corrective action plan, or any direction to attend training on personal interactions or sexual harassment, and nothing was added to the Appellant's personnel file concerning this discussion.

3. On February 17, 2011, Lisa Riccio, HR Administrator for the New Hampshire Department of Employment Security received an email approximately one page in length titled "Possible sexual harassment." The email, which was signed "Concerned Employee," talks about, "a co-worker that has been, for lack of a better word, harassing me for the last 9 months." The writer speaks of "unwanted touching," saying, "This person, is constantly touching me. Not overt sexual contact (like grabbing my rear end), more of a constant need to feel me, rub my back, put their hands on me, any form of contact..." (Appellant's Exhibit 1)
4. According to the evidence, Ms. Riccio had not spoken with the Appellant about the allegation of possible sexual harassment when she wrote to the complainant on February 28, 2011. In her email, she wrote, "Unwanted touching is not appropriate. It is clear that you have attempted to stop the behavior, yet it continues.... This behavior violates our Sexual Harassment directive and the Governor's Sexual Harassment Executive Order. Now that you have put me on notice, I would ask that you speak with me directly, we can schedule a meeting off site to discuss the matter and I will insure the behavior ceases..." (Appellant's Exhibit 1)
5. After Ms. Riccio was able to discover the identity of the complainant, she conducted a very limited investigation, relying on the complainant's statement and the Appellant's reported admissions before issuing the Appellant a written warning. Ms. Riccio issued a letter of warning to the Appellant on March 21, 2011, stating that the Appellant admitted to touching the complainant's shoulder and rubbing his head after he had cut his hair. (Joint Exhibit !)
6. Per 1002.04 (b)(24) of the NH Code of Administrative Rules prohibits, "Sexually harassment conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature." (Emphasis added.)
7. NH Department of Employment Security Directive 2030-3PR (Joint Exhibit B) states, in part, "The intent of this policy is not to create a climate of fear but to foster responsible behavior in a work environment free from discrimination. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.... "Examples of conduct which may, if continued or repeated, constitute sexual harassment are... unwelcome touching, patting, pinching or leering." (Emphasis added.)
8. "In appeals involving disciplinary action, removal for non-disciplinary reasons, involuntary transfer, non-selection to a vacancy, or the interpretation and application of a rule adopted by the director of personnel, the appointing authority shall have the burden of producing evidence supporting the action under appeal. " [Per-A 207.12(b)]
9. The State's Policy on Sexual Harassment (Joint Exhibit C) states, in part:

“In order to rise to the level of legally actionable sexual harassment, conduct creating a hostile work environment must be severe or pervasive. However, it is the intent of the State to prevent conduct from escalating to the point that a hostile work environment exists. To that end, the following conduct is considered inappropriate and is prohibited in the workplace, regardless of whether it rises to the level of being severe or pervasive: verbal abuse of a sexual nature; unwelcome, offensive sexual flirtation; unwelcome, graphic verbal comments about an individual's body; sexually degrading words to describe an individual; unwelcome brushing, touching, patting, or pinching an individual's body; sexually explicit gestures; the display in the workplace of sexually suggestive, sexually demeaning or pornographic objects, pictures, posters, or cartoons; unwelcome inquiry or comment about the sexual conduct or sexual orientation or preferences; or verbal abuse consistently targeted at only one sex, even if the content of the abuse is not sexual. Whether the conduct is severe or pervasive shall be considered in determining the level of appropriate corrective action required.”

#### Decision and Order

The Board agrees with the State that employees are entitled to work in an environment free of sexually inappropriate behavior, and that the interests of the State and its employees are best served if sexually inappropriate behavior is identified and addressed before it rises to the level of legally actionable sexual harassment. The Board also believes that employees are entitled to fair notice of performance expectations before disciplinary action is taken, opportunities to take corrective action in order to avoid future discipline, and fairness in the course of an investigation if an employee is alleged to have engaged in conduct that warrants formal disciplinary action.

The evidence in this case reflects that some time during 2009, there was some level of conversation between Ms. Bradley and her supervisor concerning an employee who had complained about Ms. Bradley getting too close to him. The State offered no evidence to suggest that the Appellant's behavior was identified in 2009 as a possible violation of the State's or the agency's sexual harassment policies, or that the agency advised the Appellant that similar conduct in the future could result in disciplinary action. The evidence reflects that Ms. Bradley received no formal counseling or discipline, that she was never given a corrective action plan, and that she was never directed to complete any training on what behaviors may or may not be perceived as sexually harassing. Without a more detailed description of the alleged physical contact between the Appellant and the complainant on that one occasion, the Board is not convinced that it would qualify as conduct that violated either the State's or the agency's policy on sexual harassment.

The complainant's original email to Ms. Riccio refers to "constant" touching and unspecified instances of harassment over a period of nine months (Appellant's Exhibit 1). The letter of warning, however, refers only to a single incident in which the Appellant reportedly touched the complainant's head after he had cut his hair. The complainant himself said that there had been "no overt sexual contact." Therefore, in the absence of any additional evidence of unwanted touching, and in the absence of any record of prior discipline, counseling, corrective action plans or required training, the Board found that this one instance would not be sufficient to support the charge that the employee violated Per 1002.04(b)(24), by engaging in, "Sexually harassing conduct, including unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature." (Emphasis added.)

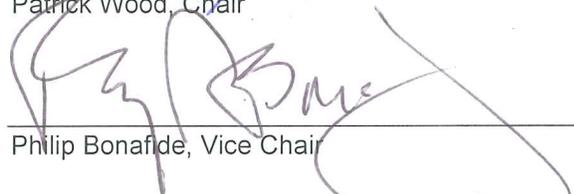
Absent any evidence that the Appellant's conduct in 2009 was actually identified as unwanted touching, or described to her as a possible violation of the State's or the agency's policy on sexual harassment, the Board also found that the reported conduct would not constitute a violation of the agency's policy 2030-3 PR in that there was insufficient evidence to support a claim of, "continued or repeated,... unwelcome touching, patting, pinching or leering." (Emphasis added.)

The Rules of the Division of Personnel describe the written warning as the least severe form of discipline used by an appointing authority to correct an employee's unsatisfactory work performance or conduct. Written warnings, by their very definition, are intended to be corrective in nature, and the Board generally is reluctant to order the removal of a written warning so long as the warning involves a reasonable work standard, the warning identifies the unsatisfactory work performance or conduct, and the warning establishes a reasonable plan of corrective action that an employee may take in order to avoid further disciplinary action. When there is insufficient evidence to support the issuance of a warning, or when there is sufficient evidence to persuade the Board that, "[t]he disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence," or that, "[t]he disciplinary action was unjust in light of the facts in evidence," [Per-A 207.12 (b)(3) and (4)] the Board may order the removal of the warning, or the Board may exercise its equitable authority as described in RSA 21-I:58, I, to amend or modify the decision of the appointing authority as the Board deems just.

For all the reasons set forth above, the Board voted unanimously to GRANT Ms. Bradley's appeal and to direct the agency to reduce the written warning to a counseling memo that explains why any intentional physical contact, even that which is meant simply as a friendly gesture, could make another employee feel uncomfortable and could lead to a complaint of sexual harassment if the recipient believes the conduct is sexual in nature.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
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