

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF MELANIE COMI

Department of Fish and Game
Docket #96-D-1 and Docket #96-D-13
August 15, 1996

The New Hampshire Personnel Appeals Board (Lawrence H. Miller, Lisa A. Rule, and James Barry, Sr.), met Wednesday, July 17, 1996, under the authority of RSA 21-1:58, to hear the appeals of Melanie Comi, an employee of the Fish and Game Department. Ms. Comi, who was represented at the hearing by SEA Field Representative Stephen J. McCormack, was appealing two letters of warning, issued to her on July 26, 1995, and February 5, 1996, for disruptive behavior in the workplace. Executive Director James DiStefano appeared on behalf of the Fish and Game Department. The appeals were made on offers of proof by the representatives of the parties.

In support of Ms. Comi's first appeal (Docket #96-D-1), Mr. McCormack argued that Ms. Comi had been falsely accused of trying to intimidate a co-worker, and of describing a co-worker as an unfit mother. He contended that the only evidence against the appellant was hearsay evidence and that it should be given little or no weight. Mr. McCormack argued that instances of interpersonal conduct between Ms. Comi and another co-worker had been reported out of context, and that none of her behavior warranted a written warning. In the second appeal (Docket #96-D-13), Mr. McCormack argued that Ms. Comi had been singled out for disciplinary action when her co-workers routinely exhibited similar behavior. He argued that there were no established policies, procedures or protocol at the work site to ensure even-handed treatment of employees. Finally, he suggested that the Department resented Ms. Comi's knowledge of the personnel rules and regulations, and discriminated

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Appeal of Melanie Comi

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against her because she dared to challenge management when she believed those regulations were being improperly or unfairly applied.

Mr. DiStefano argued that Ms. Comi had a history of disruptive behavior and that the evidence would demonstrate that Ms. Comi's conduct, not the conduct of her supervisors, was at the heart of the problem. He argued that in spite of a pattern of performance and behavioral problems, the agency had made efforts to accommodate Ms. Comi by adjusting her work schedule, changing her physical location to reduce her contact with others, and reassigning her work to make use of her strengths and minimize her weaknesses. Mr. DiStefano said that Ms. Comi's had not been singled out, noting that the Department used discipline when it became necessary.

Mr. DiStefano explained that during the process of informal settlement prior to appeal to this Board, Ms. Comi's representative had asked Mr. DiStefano to discuss the appellant's conduct with her co-workers in order to get a clearer idea of how her work area was managed. Mr. DiStefano said that he had met with her co-workers, and that although the staff was not unanimous in its opinion, the majority believed that Ms. Comi was "a problem."

Upon review of the documentary evidence, oral argument and offers of proof which the parties presented for the Board's consideration, the Board voted unanimously to deny both of Ms. Comi's appeals. Contrary to the appellant's assertion, the evidence does not demonstrate personal bias on the part of Ms. Comi's current supervisor, nor does it support the appellant's theory that she had been "singled out." Instead, the evidence supports the State's claim that Ms. Comi's behavior was disruptive.

The June 26, 1995 Performance Summary assessing Ms. Comi's performance for the period of June, 1994, through May, 1995, rated the appellant as meeting expectations in fourteen of the twenty-two performance categories. Those areas marked as not meeting expectations addressed to some extent the appellant's willingness to work cooperatively with both her co-workers and her supervisors. The

evaluation provides what appears to be an objective and unbiased assessment of Ms. Comi's work, noting her strengths as well as her weaknesses. For instance, under the heading "Communications," the evaluator commented, "Very courteous to the public and personnel from other divisions – but with co-workers sometimes rude, moody." Similarly, under the category of "Cooperation," the evaluator stated, "Is willing to help out most others in the data entry area – if she's getting along with them, but complains loudly if she has to help the front office with keying." In the overall comments section, the evaluator stated:

"Was told not to pre-number apps [for moose hunting lottery] but did it anyway because it was faster – also told Cindy to do it that way – ended up with some applicants in twice, some not in at all, which caused Wildlife Dept. havoc the day before the Lottery. However, she was very good about getting them all entered on time and worked a lot of overtime hours to complete the job."

In her response to the evaluation, Ms. Comi characterized some of the critical remarks as being, "...of a personal nature and reflected Sue Martin's displeasure with [her] overall personality." For instance, in response to the observation that she had been rude with co-workers, Ms. Comi responded:

"I do not feel as if I am rude to my co-workers. There are others in the department that won't even say good-morning to me, but do so to the person sitting next to me. There are times I feel I have been treated rudely, such as others ordering out and asking everyone, but, me. Yes, my feelings can be hurt but I just deal with it. Just the other day I said, Good Night everyone, only Fran, Kerry and Diane responded."

Where the evaluator noted that Ms. Comi was willing to help out in the data entry area but not when asked to help with keying at the front desk, the appellant wrote, "It isn't that I mind helping out the front office, it's more, I am confused why!"

Throughout the remainder of the response (SEA Exhibit 2), the appellant's comments generally reflect her resistance to supervision as well as her tendency to personalize criticism of her work or conduct. When the evaluator commented that the appellant's quality of work was a problem and that others had learned to check any work she might have done for them, Ms. Comi replied, "As far as others having to check my work that I have done for them and finding errors, I also have found errors that others have made when doing my agents. I choose to simply correct the error rather than cause the person who helped me embarrassment or humiliation."

Ms. Comi concluded her response by saying that she was unaware that she was loud and disruptive, or that she was causing a problem. However, she wrote that after speaking with one of her supervisors, she had decided "to heed his advice." She stated, "I am here to do a job, not for a social life. So I will do my best to resolve this problem [by] simply coming to work, and have my social life outside of Fish and Game."

On July 26, 1995, Ms. Comi's supervisor wrote to Business Administrator Richard Cunningham, informing him that Ms. Comi had allegedly made a remark about a fellow employee being an unfit mother, and had then attributed the remark to one of her co-workers. As a result, the co-worker wrote Ms. Comi a note, telling the appellant, "However sweet you try to be it will never be the same." Aker that, Ms. Comi allegedly would gossip about the co-worker, glare at the co-worker from her desk, and would sit in her vehicle in the parking lot revving her engine as the co-worker walked by.

In late September, 1995, there was a follow-up evaluation for the period of June, 1995, through September, 1995. The supervisor noted areas where the appellant's work had improved. However, she continued to rate the appellant below expectations in the area of "Communications," noting that in the absence of close supervision, the appellant tended to fool around too much, constantly demanding "center stage." In the "Comments" section the evaluator stated:

"Although there has been some improvement in the quality of her work, there has been no improvement in her attitude. Melanie exercises poor judgment and discretion in the workplace. I feel she needs constant supervision and will press the issue until spoken to. She spends too much time talking and fooling around. in general her behavior is disruptive; she feels that she has to be involved in every discussion and involves other employees in her disruptive behavior. She repeatedly engages in activities that are solely to draw attention to herself."

On February 5, 1996, Director DiStefano issued a second written warning to Ms. Comi (Docket #96-D-13) for continued disruptive behavior. Mr. DiStefano cited several examples of inappropriate conduct and asserted that the appellant's behavior continued to disrupt the workplace. On February 12, 1996, Union Steward Richard Tichko filed an appeal of Ms. Comi's warning, arguing that she had been singled out for conduct which was routinely exhibited by her co-workers, that there were no uniformly applied policies or procedures within her work unit, and that she had been discriminated against because she was not afraid to speak out in support of fair application of the rules and regulations. In his request for a meeting with the Executive Director to discuss the warning, Mr. Tichko also asserted that there were co-workers who would come forward to confirm Ms. Comi's allegations that she was being treated differently than her co-workers.

Two co-worker statements were offered as SEA Exhibits 8 and 9 (Docket #96-D-13). The first, a hand-written letter from Cindy¹ to Union Steward Tichko, explained the writer's opinion that Ms. Comi's conduct was a result of overwhelming personal suffering. She also indicated that Ms. Comi was not single-handedly responsible for the disruptive work environment. She wrote:

"I want to help Melanie. She is not completely to blame for everything that goes on. When Mel is wrong I don't stand up for her and I won't go along with her in many ways, but when she is being totally blamed for something that is not totally her fault I

¹ It appears that the author of the note to Mr. Tichko is the co-worker Ms. Comi allegedly intimidated.

stand up for her. ... When Mel is alone and Diane and Fran aren't there, she is a different person. Most times she bothers no one. When the 3 of them are together one is as bad as the other. There is total disruption and it continues through the day. If the 3 of them are there and Mel is being quiet and bothering no one they go to her and together they get her going and it starts all over again. When 1 of the 3 of them shows up for work there is no real problem, but most often the 3 of them together causes the problem that exists that you are desperately trying to stop. Mel is not the complete problem. Together the 3 of them become very uncontrollable. They don't want to follow rules. Rules don't apply to them. They don't respect discipline."

The second letter written in support of Ms. Comi's appeal was written by Diane Beard. In it, Ms. Beard said:

"Susan Martin [the appellant's supervisor] does treat people differently in the Data Entry section. Susan Martin, being the supervisor has different rules for different people. While some people are forced to stay at their desks and work others are allowed to roam freely and socialize when ever they feel like it. Some are allowed to talk constantly, which is sometimes very much an irritant."

Ms. Beard wrote that there was a serious problem in the data entry area, but that the problem was the result of management and a lack of appropriate supervisory methods. Ms. Beard asserted that there were no written rules or procedures for office behavior, and that it depended on "who you are as to what you can do, say or wear."

The Board noted that "Diane" is one of the names appearing in Cindy's letter to Mr. Tichko, the Union Steward. Presumably this is the same Diane to whom Cindy referred saying, "Together the 3 of them become very uncontrollable. They don't want to follow rules. Rules don't apply to them."

They don't respect discipline." As such, the Board found that Ms. Beard's assessment of the work environment may not have been entirely objective or accurate, and gave it the weight it deserved.

Findings of Fact

1. Ms. Comi, a Data Entry Clerk in the New Hampshire Department of Fish and Game, received written warnings on July 22, 1995, and February 5, 1996, for disruptive behavior.
2. Ms. Comi was advised of deficiencies in her performance, specifically with regard to communications, cooperation and workplace behavior, in Performance Evaluations dated June 26, 1995, and September 29, 1995, and in supervisory memos dated December 27, 1995, December 28, 1995, and January 21, 1996.
3. The Performance Evaluations dated June 26, 1995, and September 29, 1995, are internally consistent, and offer a fair appraisal of Ms. Comi's performance.
4. The Response to Performance Evaluation and co-worker statements which Ms. Comi offered in support of her appeal provide persuasive evidence that Ms. Comi's workplace conduct is disruptive.
5. The appellant failed to offer evidence supporting her claim that she was sufficiently familiar with the personnel rules or regulations to know when management was or was not applying the rules correctly.
6. The appellant failed to offer evidence supporting her theory that because of her familiarity with the personnel rules, and her willingness to speak up in favor of fair administration of those rules, management resented her or discriminated against her.

Rulings of Law

1. Per 1001.03 (a)(6) of the Rules of the Division of Personnel describes a letter of warning as "the least severe form of discipline to correct an employee's unsatisfactory work performance for offenses including, but not limited to Exhibiting uncooperative or disruptive behavior..."

2. Per-A 203.01 of the Rules of the Personnel Appeals Board provides that, "The burden of proof in disciplinary appeals shall be upon the employee."

Decision and Order

On the evidence, oral argument and offers of proof which the parties presented for the Board's consideration, the Board voted unanimously to deny Ms. Comi's appeals. In so doing, the Board found that Ms. Comi's behavior in the work place was disruptive. The evidence which Ms. Comi offered in support of her appeal is inconsistent with the theory that she had been singled out and disciplined for conduct which was otherwise considered acceptable within her work area, or that her department resented any special knowledge she might have of the personnel rules and regulations and had somehow discriminated against her as a result.

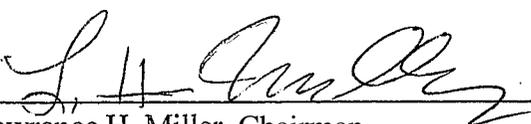
The Board was not persuaded that the agency had any obligation to establish "...policies, procedures or protocol within her worksite" to distinguish between acceptable and unacceptable behavior, or that the absence of such policies and procedures provided grounds for removal of the appellant's warnings. The evidence reflects that the staff at Fish and Game, both those who issued the warnings to Ms. Comi and those who wrote in support of her appeal, understand what conduct is considered disruptive. The evidence and offers of proof reflect that Ms. Comi's conduct in the workplace has been disruptive.

Ms. Comi's argument that she should not be disciplined for conduct which was similar to her co-workers was equally unpersuasive. First, there is insufficient evidence to support a finding that the kind conduct for which Ms. Comi was disciplined is commonplace. Furthermore, even if it were proven that there are co-workers who conduct themselves in similar fashion, over-turning the warnings would not be the appropriate remedy. Employees who engage in similar conduct should receive similar discipline.

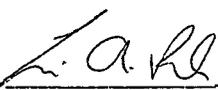
The Board found that the employer provided sufficient notice to the employee that her behavior was inappropriate. The employer gave Ms. Comi the opportunity to take corrective action, and warned her that failure to do so would result in disciplinary action. When Ms. Comi failed to take corrective action, she received written warnings which, by definition, are the least severe form of discipline to correct an employee's unsatisfactory work performance.

For the reasons set forth above, Ms. Comi's appeals are denied.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Lawrence H. Miller, Chairman



Lisa A. Rule, Commissioner



James Barry, Sr., Commissioner

cc: Virginia A. Lamberton, Director of Personnel
James DiStefano, Executive Director, Fish and Game Department
Stephen J. McCormack, SEA Field Representative