

The State of New Hampshire

Supreme Court

No. 99-387 *Appeal of Phillip Copp*

TO THE CLERK OF NH PERSONNEL APPEALS BOARD #99-D-14

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

August 6, 1999.

*Appeal from administrative agency is declined.
See Rule 10(1).*

September 2, 1999

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF PHILLIP COPP
N. H. STATE LIQUOR COMMISSION
DOCKET #99-D-14

March 31, 1999

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on Wednesday, March 24, 1999, under the authority of RSA 21-I:58, to hear the appeal of Phillip Copp, an employee of the Liquor Commission. Mr. Copp, who was represented at the hearing by SEA Field Representative Jean Cliellis, was appealing a five day suspension without pay effective September 17, 1998, on charges that he engaged in conduct that was inappropriate and unprofessional. George Liouzis, Human Resources Administrator, appeared on behalf of the Liquor Commission.

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

State's Exhibits

1. September 17, 1998, written warning issued to Senior Investigator Copp by the Liquor Commission detailing the basis for his suspension
2. September 22, 1998, letter from SEA Field Representative Jean Cliellis to John Byrne, Liquor Commission Chairman, appealing Mr. Copp's suspension without pay

3. October 20, 1998, letter from Liquor Commission Chairman Byrne to Senior Investigator Copp affirming the Commission's findings of inappropriate and unprofessional conduct
4. November 4, 1998, letter from SEA Field Representative Jean Chellis to Personnel Director Virginia Lamberton appealing Mr. Copp's suspension without pay
5. Copy of Per 1001.05 of the Rules of the Division of Personnel, Suspension Without Pay

Appellant's Exhibits

1. September 17, 1998, written warning issued to Senior Investigator Copp by the Liquor Commission detailing the basis for his suspension
2. Copy of an envelope postmarked September 22, 1998, from the Liquor Commission to Senior Investigator Copp
3. Liquor Commission Standard Operating Procedure #93-22, Subject: Sexual Harassment
4. Affidavit of Phillip Copp dated March 3, 1999
5. Letters of warning: December 30, 1997, issued to an employee of the Division of State Police, and March 3, 1998, to an employee of the Department of Health and Human Services
6. State Liquor Commission Regulation 7.9 Progressive Discipline

The following facts are not in dispute:

1. Phillip Copp is employed by the New Hampshire State Liquor Commission as a Senior Investigator.
2. In that capacity, Mr. Copp is responsible for working as a Field Training Officer for Probationary Investigators assigned to his supervision.
3. When one of Mr. Copp's subordinates filed a charge of sexual harassment against him, the State conducted an investigation in compliance with Liquor Commission S.O.P. 93-22, and in accordance with the State's policy on sexual harassment.
4. Although the investigator found that the charge of sexual harassment could not be proven by a preponderance of the evidence, the Liquor Commission found that the conduct to which the appellant admitted was both inappropriate and unprofessional.
5. On September 17, 1998, Senior Investigator Phillip Copp met with members of the New Hampshire State Liquor Commission to: 1) review the statements that the appellant

reportedly made during the course of the sexual harassment investigation, and 2) determine if the appellant's conduct warranted disciplinary action.

6. After hearing and considering what Mr. Copp described as his testimony before the Commission, the Commission voted to suspend the appellant without pay for a period of five days.
7. At the end of the meeting, Chairman Byrne advised the appellant that the suspension would not go into effect until Mr. Copp had had the opportunity to appeal the suspension to the Personnel Appeals Board. However, after consultation with the agency's human resources office, the suspension was made effective that day.
8. The Commission did not issue written notice of suspension until September 17, 1998, and did not forward that letter to the appellant until September 22, 1998.
9. The Commission's September 17, 1998, warning alleges that during the course of the State's sexual harassment investigation, Mr. Copp had admitted that he: 1) had given Ms. Feenstra a flower, 2) had given Ms. Feeizstra a hug, 3) had telephoned Ms. Feeizstra and had told her it was an obscene phone call, 4) had commented to Ms. Feenstra that guests on his boat may not wear clothes, and 5) had told Ms. Feenstra that he had installed a surveillance camera in the ladies room at the Salem Liquor Store and therefore knew what she was wearing.
10. In his affidavit, Mr. Copp admitted that he had given Ms. Feenstra a lilac; however, he asserted that it was no different than any other supervisor giving flowers to a secretary for a birthday, Secretary's Day, or for any other reason.
11. In his affidavit, Mr. Copp admitted that he had hugged Ms. Feenstra; however, he characterized the hug as a "pat-on-the-back" hug for a job well done rather than as a sign of affection.
12. In his affidavit, Mr. Copp admitted that he had telephoned Ms. Feeizstra at her residence and that after a brief conversation, he had stated, "This is an obscene phone call, tell me what you want to hear." He asserted that the purpose of the call was to discuss a change in work schedules, and that he had made the comment as a joke once he believed that Ms. Feeizstra had recognized his voice.
13. In his affidavit, Mr. Copp admitted that he had invited Ms. Feeizstra to go boating and had commented "no clothes allowed." However, he asserted that his remark was, "an open-ended

statement" that he normally would make to any guest on his boat because, "...we usually go swimming or waves soak the passengers.",

14. In his affidavit, Mr. Copp admitted that while visiting the Salem Liquor Store, he had told Ms. Feenstra that he and two other employees had been watching her on a surveillance camera. He pointed to the video display for camera #6 and asked if she had seen the camera in the ladies room. When Ms. Feenstra responded that there was no camera in the ladies room, Mr. Copp asked if she had seen boxes in the ladies room, pointing out the boxes shown on the display. The #6 camera was actually located in the warehouse. Mr. Copp denied ever having stated that he had installed a camera in the ladies room. He also denied discussing what Ms. Feenstra was wearing.
15. Liquor Commission S.O.P. Number 93-22 provides that, "All supervisory personnel shall annually participate in a training session on sexual harassment and other forms of discrimination which includes information about the types of conduct which will not be tolerated in the work place. Each participant shall be informed that he/she is responsible for knowing the contents of the state's sexual harassment policy and for giving similar presentations to employees."
16. Mr. Copp's last received formal training on the sexual harassment policy in 1994.
17. N. H. State Liquor Commission Policy 7.9.1 states, "The NHSLC uses a progressive discipline process to deal with the violation of a recognized standard or rule or failure to meet work standards. The steps to this process include: (1) Getting the facts and trying to understand what happened; (2) Issuing a counseling letter; (3) Issuing a written warning; (4) Taking additional actions of increasing severity to include disciplinary suspension without pay and termination. The severity of the offense may immediately warrant issuing a written warning and/or termination...."
18. Prior to his suspension on September 17, 1998, Mr. Copp had never received any formal discipline.

Ms. Chellis argued that in the Appeal of Pritchard¹, the Supreme Court had found that an appellant's fifteen day time limit for filing an appeal ran from the date of the action under appeal, not the date of notice. Therefore, she argued, by suspending Mr. Copp before providing him with written notice of his suspension, the Commission jeopardized his right to appeal. She argued that there was no compelling reason why the Commission could not have met with Mr. Copp, considered the evidence discussed at the meeting, reached a decision, and then transmitted that decision in the form of a written notice.

Ms. Chellis argued that even if the Board were to find that the Commission's failure to provide notice in advance of the suspension did not violate the Director's Rules, the Board should find that the disciplinary process violated the Commission's own policies and procedures, and that the level of discipline imposed was disproportionate to the severity of the alleged offense. In support of that position, she offered into evidence written warnings issued to employees in two other agencies who received only written warnings despite findings that their conduct constituted sexual harassment. She argued that the Commission's decision to suspend Mr. Copp after specifically finding that he did not commit sexual harassment was unfair.

Mr. Liouzis argued that it was in keeping with both the spirit and the intent of the Rules for the Commission to meet with Mr. Copp, to provide an opportunity for him to refute the evidence against him, and to weigh the information he offered before deciding what discipline would be appropriate. He argued that the Rules did not require the agency to provide written notice prior to the meeting, and said it was more important for the agency to hear what the appellant had to say before deciding on a particular course of action. Mr. Liouzis admitted that there was no compelling reason to have made the suspension effective immediately. However, he believed that the Commission wanted to bring some closure to what had been a lengthy and a difficult process for both the appellant and the agency.

Mr. Liouzis argued that the appellant was trying to "have it both ways" when he suggested that although the improper conduct should not be deemed harassment, it would not have occurred

¹ (1993) 137 N. H. 291, 627 A.2d 102

if the Commission had provided annual sexual harassment training. He also argued that the Commission's policy calling for progressive discipline took into consideration the seriousness of the offense, and that in circumstances such as those revealed during the course of the investigation, such policy may call for more serious discipline. He noted that the prior Personnel Rules required at least one warning for a similar offense before an employee could be suspended. However, he argued, when the Personnel Rules were revised, they provided for suspension without prior warning when the offense warranted such action.

Mr. Liouzis argued that suspension was not too severe a discipline in this case. He argued that while the Commission does not expect the relationships between employees to be absolutely pristine, the Commission does expect those relationships to be professional. He argued that although the appellant himself had described Ms. Feenstra as having low self-esteem, as her supervisor he found it amusing telling her that there was a camera in the ladies' room where he and others had been watching her. He argued that in addition to not being funny, the conduct was totally unprofessional, totally uncalled-for and warranted severe discipline.

Ms. Chellis argued that until Ms. Feenstra filed the harassment charge, she had never indicated that she was offended by the appellant's conduct or remarks. She even asked not to be reassigned when such reassignment had been discussed. Ms. Chellis asked the Board to find that without prior counseling and discipline, none of the appellant's actions or comments were sufficiently egregious to warrant immediate suspension.

Ms. Chellis argued that the Liquor Commission violated Per 1001.05 by failing to provide written notice to Mr. Copp of the suspension until after the suspension itself had become effective. She argued that Webster's Dictionary defines notice as "a written or printed announcement," and that to announce means, "to indicate beforehand." She argued that by failing to provide written notice prior to the effective date of suspension, and sending instead a written "confirmation" of the suspension, the Liquor Commission violated Per 1001.05 of the Rules of the Division of Personnel. She argued that RSA 21-I:58 requires the Board to reverse

any action taken in violation of Rules adopted by the Director, and to reinstate the appellant without loss of pay, and that Mr. Copp must prevail in his appeal as a matter of law.

Rulings of Law

A. Per 1001.05 (f) of the Rules of the Division of Personnel provides that:

"No appointing authority shall suspend a classified employee without pay under this rule until the appointing authority:

(1) Offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to suspend the employee;

(2) Provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority, however:

a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from suspending an employee pursuant to Per 1001.05; and

b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from suspending an employee pursuant to Per 1001.05.

B. Per 1001.05 (g) of the Rules of the Division of Personnel provides that:

"An appointing authority shall provide written notice of the suspension to both the employee and the director, detailing:

(1) The cause of the suspension;

(2) The duration of the suspension;

(3) If appropriate, the specific corrective action which the employee shall take to avoid additional disciplinary action;

(4) A warning that failure to take corrective action shall result in additional disciplinary action up to, and including, discharge from employment;

(5) Notice that the suspension shall be deemed a written warning under the provisions of Per 1000; and

(6) Notice to the employee that the suspension may either be:

a. Appealed to the board within 15 calendar days from the date of notice pursuant to RSA 21-I:58; or

b. Resolved through the procedures for settlement of disputes pursuant to Per 202.

C. RSA § 21-I:58, I, states in part:

" Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. The appeal shall be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period."

D. RSA 21-I:58, I, also states:

"In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. "

Decision and Order

The Board must read the Personnel Rules as a whole. The Board finds that the plain language of the rule, when read in its entirety, does not require prior written notice of suspension. The rule's intent appears to be that the allegations will be discussed fully, and that appellants have a meaningful opportunity to hear the charges and refute them. When an employee is able to demonstrate that discipline is unwarranted, discipline will not be imposed. In this case, imposing

discipline in the form of an unpaid suspension involves written notice to both the employee and the Director of Personnel. It is unreasonable to believe that the Director should receive notice of a disciplinary action before the employee has had the opportunity to hear the charges and refute the evidence.

Despite the appellant's assertion that his due process rights were jeopardized by the agency's decision to suspend him without providing prior written notice, the Board found that the statute and the rules are not inconsistent in this case. RSA 21-I:58 states that an employee has fifteen days within which to appeal any application of the personnel rules. Although the appellant began his five-day suspension on September 17, 1998, that action was not final for appeal purposes until written notice had been served as well, as notice was indeed required. Therefore, the Board found that the suspension without prior written notice was not in violation of Per 1001.05.

The Board does not believe that the Liquor Commission's progressive discipline policy should be interpreted as requiring the agency, in all cases, to take each of the steps included in the policy without regard to the nature of the offense. Furthermore, the policy states that, "The severity of the offense may immediately warrant issuing a written warning and/or termination," and the Board found it would be illogical to read the policy as excluding any of the disciplinary options in between. The Board believes that the policy was intended to provide notice to employees that in certain circumstances, the agency can use any form of discipline, up to and including termination, provided that the discipline imposed is consistent with the Personnel Rules. Therefore, the Board found that the agency would not violate its own policies if it chose suspension as the appropriate discipline if the agency found that the employee's conduct was inappropriate, unprofessional, and sufficiently egregious to warrant suspension.

There is no dispute that the agency failed in their duty to provide annual sexual harassment training as outlined in their Standard Operating Procedure. Such failure might be dispositive if Mr. Copp had been disciplined for acts of sexual harassment. However, where the suspension was the result of a finding that the appellant's conduct was inappropriate and unprofessional, the

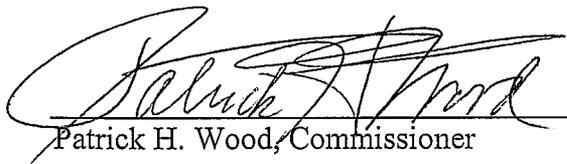
lack of yearly training may go to the relief the Board could order, but not to the agency's right to discipline him.

Having considered the evidence, arguments and offers of proof, under the authority of RSA 21-I:58, the Board voted to MODIFY THE APPOINTING AUTHORITY'S DECISION by reducing the length of the suspension from five days to three days, with the notice of suspension having the effect of written warning for purposes of any future discipline. In so doing, the Board considered the written warnings offered as Appellant's Exhibit 5 and found that the information provided does not suggest sufficiently similar circumstances to warrant a finding that the appellant received dissimilar treatment for a similar offense.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett, Chairman


Robert J. Johnson, Commissioner


Patrick H. Wood, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jean Chellis, SEA Field Representative, PO Box 3303, Concord, NH 03302
George Liouzis, Human Resources Administrator, NH State Liquor Commission, Storrs
St., Concord, NH 03301

State of New Hampshire



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Telephone (603) 271-3261

APPEAL OF PHILLIP COPP *N. H. STATE LIQUOR COMMISSION*

DOCKET #99-D-14

Response to Appellant's Motion for Reconsideration

June 3, 1999

On April 15, 1999, the Board received Appellant's Motion for Reconsideration of the Board's March 31, 1999, decision in the above-captioned appeal.

In general, a request for reconsideration must either allege that the Board has made an error of law or must present additional facts that were not available at the original hearing. In order to request a rehearing, the party dissatisfied with the Board's order must set forth every ground upon which it is alleged that the Board's decision is unlawful or unreasonable. The Board may grant a rehearing if, in its opinion, good reason for such rehearing is stated in the motion.

Having reviewed the appellant's request in conjunction with the Board's decision in this case, the Board voted to DENY the motion, finding that no good reason for reconsideration was stated therein. The appellant failed to persuade the Board that its March 31, 1999, order was unlawful or unreasonable in light of the facts in evidence. The appellant offered no new evidence, and presented the same legal arguments in support of the Motion that were presented at the hearing on the merits and fully considered by the Board in reaching its decision.

The Board responds to the specific grounds raised in the Appellant's Motion as follows:

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1. As set forth in the Board's decision, Per 1001.05 (g) clearly outlines those things that must occur before an employee is suspended. It does not mandate notice prior to the meeting held between the employee and employer under the provisions of Per 1001.05 (f), nor does it require written notice prior to the effective date of the suspension.:

"No appointing authority shall suspend a classified employee without pay under this rule until the appointing authority: (1) Offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to suspend the employee; (2) Provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority, however: a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from suspending an employee pursuant to Per 1001.05; and b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from suspending an employee pursuant to Per 1001.05. "

The Board declines to interpret the rule so as to impose additional obligations upon the employer or the employee that are not set forth in the rule as written.

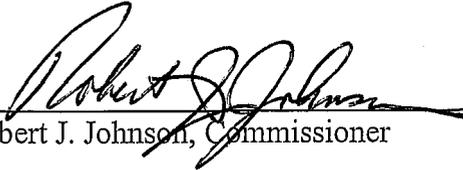
2. The Board did not find that an employee must wait to receive written notice of the 'suspension before the employee can appeal to the Personnel Appeals Board, nor did the Board find that an employee could be expected to understand what corrective action was required if the employee had not been apprised of the employer's expectations. The Board found that the appellant was not deprived of his rights under the statutes or the administrative rules.
3. The appellant's assertion "appointing authorities will be able to manipulate their written notices on a case by case, ad hoc, basis, and we will have factual hearings on the reasonableness of every suspension notice," provides no good reason for the Board to reconsider its decision in this case. Each case must be considered on its own merits, and the

prospect that some case in the future may involve the question of "reasonable notice" can not be taken into consideration in deciding the instant Motion.

4. The appellant failed to provide evidence or argument to support the claim that not receiving prior written notice of the suspension constituted a violation of his due process rights.
5. The appellant's claim of disparate treatment is unsupported by any credible evidence or offer of proof. As set forth in the Board's earlier decision, the information provided by the appellant did not suggest sufficiently similar circumstances to warrant a finding that the appellant received dissimilar treatment for a similar offense. The Board exercised its authority to amend the appointing authority's order by reducing the suspension from five days to three days.
6. The appellant argued that, "...the 'agency's failure to follow its own policy should go to the agency's right to discipline the appellant, such that the suspension was illegal." As the Board indicated in its March 31, 1999, decision, Liquor Commission S.O.P. Number 93-22 provides for annual supervisory training on sexual harassment and other forms of discrimination. Mr. Copp was not disciplined for harassment or for discrimination, however, but for engaging in conduct that was inappropriate and unprofessional.
7. Conduct to which the appellant admitted included: 1) inserting the remark, "This is an obscene phone call, tell me what you want to hear" into a conversation with a subordinate employee, 2) inviting that employee to go boating, then remarking "no clothes allowed," and 3) telling a subordinate employee, who the supervisor identified as having very low self-esteem, that he and two other commission employees had been watching her on a video camera located in the ladies' room of the store that they were visiting. The appellant failed to persuade the Board that because Mr. Copp did not receive annual sexual harassment training, he was unable to understand that such conduct was inappropriate, unprofessional, and sufficiently egregious to warrant substantial discipline.

For the reasons set forth above, the appellant's Motion for Reconsideration is DENIED.

THE PERSONNEL APPEALS BOARD


Robert J. Johnson, Commissioner


Patrick H. Wood, Commissioner

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jean Chellis, SEA Field Representative, PO Box 3303, Concord, NH 03302
George Liouzis, Human Resources Administrator, NH State Liquor Commission, Storrs
St., Concord, NH 03301