

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of John Disko -- Docket #2007-D-004

Department of Safety

May 25, 2007

P.A.B. Decision In Re: Appellee's Response to Appeal of Discipline

By letter dated May 9, 2007, SEA Field Representative Stephen McCormack requested a hearing to appeal an October 11, 2006 letter of warning issued to John Disko, an employee of the Department of Safety, for failure to meet work standards. On May 18, 2007, Attorney Marta Modigliani submitted the Department of Safety's Response to the appeal of John Disko, arguing that the warning was justified. In that response, Attorney Modigliani summarized the facts as alleged by the State in the letter of warning. She then asked the Board to dismiss the appeal, arguing that the appellant could not meet his burden of proof, and would be unable to demonstrate that the decision to discipline the appellant was unlawful, that it violated the personnel rules, that it was unwarranted by the alleged conduct or failure to meet the work standard, or was unjust in light of the facts in evidence.

SEA Field Representative McCormack responded by letter dated May 24, 2007, asking the Board to deny the State's request. Mr. McCormack argued that while the appellant had the burden of proof, the State had the burden of production. Mr. McCormack argued that the appellant, at hearing, would prove that the warning was unjust and unwarranted.

Per-A 206.05 (c) and (d) of the Board's rules provide that a Motion to Dismiss "shall state specifically the grounds upon which the movant asserts the right to have the appeal dismissed or an order of summary judgment issued as a matter of law," and, "Unless such motion is accompanied by competent evidence and a supporting memorandum of law detailing the board's authority to issue such an order, the motion shall be denied." In this case, the Appellee's request did not state specifically the grounds upon which the agency would be

entitled to have the appeal dismissed as a matter of law, nor was the request accompanied by competent evidence or a supporting memorandum of law. Therefore, the request must be DENIED.

A motion to dismiss is "A motion requesting that a complaint be dismissed because it does not state a claim for which the law provides a remedy, or is in some other way legally insufficient." [Blacks Law Dictionary, 6th ed., p. 1014.] The complaint in this case was sufficient to grant the request for a hearing. Additionally, even if there were no material facts in dispute, the law would still provide the appellant a remedy if the appellant could persuade the Board to exercise its authority under the provisions of RSA 21-I:58, I, which provides that, "...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."

Accordingly, the Board voted to DENY the State's request to dismiss the appeal.

THE PERSONNEL APPEALS BOARD

/S/

Philip Bonafide, Chair

/S/

Robert Johnson, Commissioner

/S/

Joseph Casey, Commissioner

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