

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Philip Dubia - Docket #99-D-8
Department of Safety - Division of State Police
(Oral argument on Motion to Dismiss for Lack of Jurisdiction)

January 7, 1999

The New Hampshire Personnel Appeals Board (Bennett, Rule and Barry) met on Wednesday, December 16, 1998, under the authority of RSA 21-I:58, to hear oral argument on the State's Motion to Dismiss the Appeal of Philip Dubia. The appellant, an employee of the Division of State Police, Department of Safety, was appealing "Division-level counseling" arising out of Trooper Dubia's alleged violation of the New Hampshire State Police Professional Standards of Conduct, the New Hampshire State Police Mission Statement, and the New Hampshire State Police Vision Statement. Attorney James W. Donchess appeared for the appellant. Attorney Sheri J. Kelloway-Martin appeared for the State.

On September 3, 1998, the State filed a Motion to Dismiss Trooper Dubia's appeal for lack of jurisdiction. Ms. Kelloway-Martin argued that Trooper Dubia had received Division level counseling on June 24, 1998, following investigation of an April 8, 1998, incident involving a motorist. She argued that as a result of the investigation, the State determined that Trooper Dubia's actions constituted a violation of several sections of the Standards of Professional Conduct, and that rather than disciplining him, the State elected to use Division-level counseling to correct his performance. Ms. Kelloway-Martin argued that the Board's statutory authority to hear and decide appeals is defined by RSA 21-I:58, and applies only to those instances where an employee is "affected by any

application” of the Personnel Rules. She argued that counseling is routinely used to direct employees and correct deficiencies in their performance. She asked the Board to find that such counseling does not rise to the level of discipline as defined by the Rules. She referred the Board to Chapter Per 1000 of the Rules, noting that the least severe form of discipline recognized by the Rules is a written warning. She argued that the Board has repeatedly recognized the inherent usefulness of performance counseling because it documents performance issues and puts employees on notice before formal discipline becomes necessary.

Ms. Kelloway-Martin argued that as a matter of public policy, there were basic reasons why the Board should not assert its jurisdiction in this instance. First, she argued that the Collective Bargaining Agreement between the Troopers Association and the State recognizes management’s prerogative to manage and direct employees. She argued that if the Board found that it had jurisdiction in this instance, it would be asserting jurisdiction to determine how best to supervise an employee. She argued that even in cases of formal discipline, the Board should not substitute its judgment for that of a supervisor/appointing authority. She suggested that if the Board were to find that it had jurisdiction, it would constantly be in the position of substituting its judgment for that of managers and supervisors in the State's daily operations.

Ms. Kelloway-Martin also argued that if the Board were to find that it had jurisdiction to hear Trooper Dubia’s appeal, it would be setting a precedent. She argued that by accepting this appeal, the Board would be giving Division level counseling the same weight, requiring the same level of scrutiny, as formal discipline. She argued that it would be a disincentive for supervisors to use counseling, and would have the effect of encouraging management to simply move directly to formal discipline.

Attorney Donchess argued that Trooper Dubia’s appeal arises from the fact that the Division of State Police made specific written findings that he had violated the Division's professional standards. He argued that in spite of the State's assertion that Trooper Dubia

had not been "affected" by a written counseling, the issue had been elevated to a matter subject to review by the Board by virtue of the fact that there was an investigation and that there were specific written findings issued concerning the appellant's conduct.

Attorney Donchess argued that having written findings on file that Trooper Dubia had violated certain professional standards of conduct had the potential of creating a negative impact on his career. He argued that the presence of those findings in his personnel file would likely affect his prospects for promotion in the future, and could later be used as evidence should the Division of State Police ever undertake formal discipline against him for allegedly similar conduct.

Attorney Donchess argued that there were facts in dispute concerning the incident that resulted in the investigation of Trooper Dubia's conduct and the subsequent issuance of a counseling letter. He argued that Trooper Dubia should have the opportunity to refute the State's allegations and to have the Board order that the counseling memo be removed.

The Rules of the Division of Personnel recognize the written warning as the least severe form of discipline an appointing authority may use to correct an employee's unsatisfactory work performance. The appellant failed to persuade the Board that Division-level counseling rises to the level of discipline contemplated by the Rules. The appellant also failed to persuade the Board that counseling, in and of itself, should be deemed an "action" subject to appeal.

The Board finds that counseling is more accurately described as part of the performance evaluation process, and that the only remedies available to Trooper Dubia are those that would be available to an employees who has received a negative performance evaluation.

RSA 21-I:46, I, states, in pertinent part:

“The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel except those related to:

(a) Performance evaluations of classified employees; provided, however, that an employee who is disciplined or has other adverse action taken against him as the result of an evaluation may appeal that action.”

RSA 21-I:42, XIII also provides in pertinent part that:

“(a) All full-time classified employees shall be evaluated on a regular basis.

(b) Evaluations shall be in writing and shall be conducted at least annually.

(c) Evaluations shall be conducted by an employee's immediate supervisor.

(d) Evaluations shall be based upon specific written performance expectations or criteria developed for the position in question and employees shall be made aware of these performance expectations in advance of any evaluation.

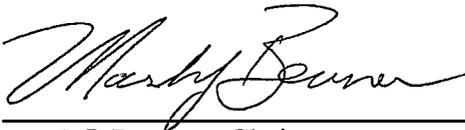
(e) The evaluation format shall include a narrative summary on the employee's performance

(f) Employees shall be permitted to participate in the evaluation process, shall be given a copy of their evaluation, and shall have an opportunity to comment, in writing, on their evaluation, and such comments will be included in the employee's permanent record.

(g) Employees shall have a right to nonconcur, in writing, with their evaluation.”

Having considered the Motion, Objection and oral argument by the parties, the Board voted unanimously to dismiss Trooper Dubia's appeal. The Board finds that Division level counseling is not a recognized form of discipline and has not affected Trooper Dubia's employment. Therefore, the instant appeal is outside the Board's subject matter jurisdiction. To the extent that there is a dispute between the parties with respect to the facts of the incident that resulted in Trooper Dubia receiving counseling, and a negative evaluation of his performance in that instance, he does have the right to nonconcur in writing with the Division's findings and to have his written response placed on file with the counseling letter.

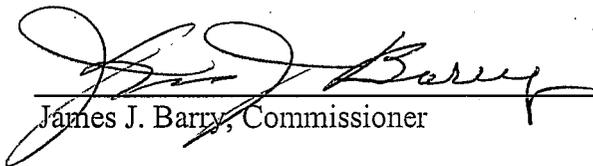
THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Attorney James Donchess
Attorney Sheri Kelloway-Martin