

# State of New Hampshire



PERSONNEL APPEALS BOARD  
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## *APPEAL OF THOMAS R. FLYNN*

*DOCKET #99-D-1*

### *NEW HAMPSHIRE FISH AND GAME DEPARTMENT*

*December 7, 1998*

The New Hampshire Personnel Appeals Board (Bennett, Wood and Barry) met on Wednesday, August 26, 1998, to hear the appeal of Thomas R. Flynn, an employee of the New Hampshire Fish and Game Department. Mr. Flynn, who was represented at the hearing by SEA Director of Field Operations Thomas Hardiman, was appealing an October 24, 1997, letter of warning issued to him under the provisions of (former) Per 1001.03 (a) (6) and (8) for exhibiting uncooperative or disruptive behavior, and for exhibiting physically or verbally abusive behavior in the workplace. Public Works Manager John S. Bowyer, Jr., 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 the audio tape recording of the hearing on the merits, notices and orders issued by the Board, and the pleadings with attachments submitted by the parties prior to the hearing. The material facts are not in dispute.

1. Mr. Flynn is employed in the Access and Engineering section of the Fish and Game Department as a carpenter.
2. Although the Department is not required to provide work boots for Access and Engineering employees, the practice within that section had been to allow those employees who were required to work out-of-doors up to \$100 per year for the purchase of boots.

3. On October 16, 1997, Mr. Flynn submitted for Mr. Bowyer's approval a \$100 field purchase order for boots, and informed Mr. Bowyer that he intended to make the purchase on Saturday using a one-day only, 10% off sale coupon.
4. Mr. Flynn initiated a heated exchange with Mr. Bowyer, and Ms. Locke, a secretary in the department, when Mr. Bowyer asked if it had been a full year since Mr. Flynn's last boot purchase, and refused to approve the field purchase order without first reviewing the request.
5. Ms. Locke and Mr. Bowyer explained that a revised purchasing policy was being considered, and Mr. Flynn's request would be considered in terms of the proposed changes.
6. Mr. Flynn believed the department had shown favoritism by allowing two other employees to purchase boots more frequently than once a year, and by pennitting them to spend more than \$100 for the purchase.
7. When Mr. Flynn was ready to leave work at 3:30 p.m., on Friday, October 17<sup>th</sup>, Mr. Bowyer had not approved or returned the field purchase order.
8. Mr. Bowyer did not approve the field purchase order until Sunday, October 19<sup>th</sup>, when he was in the office.
9. Mr. Flynn initiated another heated exchange with Mr. Bowyer about the boot purchase in front of other staff, on Monday, October 20<sup>th</sup>.
10. On October 24, 1997, Mr. Flynn received a written warning in which Mr. Bowyer wrote, "While there are no problems with the quality of your work product, your disrespectful attitude and your unwillingness to respond to supervision have severely affected your ability to work as a productive member of any crew or work unit to which you can be assigned." The letter also referred to a previous letter of counseling as a result of another unspecified incident that had occurred approximately one month earlier.
11. In his November 4, 1997, letter to Mr. Bowyer requesting informal settlement of the written warning, Mr. Hardiman wrote that the appellant objected to the reference to a previous letter of counseling since it actually had been issued as a written warning, but did not meet the standard for a written warning. He also wrote that Mr. Flynn had apologized for his conduct,

and that the agency should not view the incident(s) as a true representation of Mr. Flynn's work attitude.

12. Mr. Hardiman, Mr. Flynn, Mr. Kuss and Mr. Bowyer met on November 20, 1997, in an effort to reach an informal settlement of the dispute.
13. In a letter dated January 16, 1998, addressed to Mr. Hardiman, Mr. Bowyer indicated that he could agree to rewrite the warning, removing reference to an earlier counseling/warning letter. However, he did not agree to shorten the period of time that the warning would be effective, or the length of time the warning would remain in Mr. Flynn's personnel file.

Mr. Hardiman argued that the appellant believed he was not receiving the same consideration or treatment as his co-workers, and was understandably upset when the department refused to approve the field purchase order in time for him to take advantage of a sale. He argued that the incidents were unfortunate, but should not be considered indicative of the appellant's performance overall, particularly since Mr. Flynn acknowledged how inappropriate his conduct had been and apologized to Mr. Bowyer before any disciplinary action had been discussed. Mr. Hardiman asked the Board to find that the agency failed to utilize "progressive discipline," and that in light of the facts in evidence, the appellant's conduct did not warrant a written warning.

Mr. Bowyer argued that the confrontation over the field purchase order was not an isolated incident. He argued that both he and John Kuss had counseled Mr. Flynn about his behavior in the past, and when they realized that counseling was not improving the appellant's behavior, the agency initiated disciplinary action by issuing a written warning in August, 1997. He said that when he learned that the warning was not technically correct, he realized it could only be considered a letter of counseling. Mr. Bowyer said that he was surprised when the appellant raised the issue of provocation late in the informal settlement process, as that issue was not raised with him during the informal settlement meeting on November 20<sup>th</sup>.

Mr. Bowyer argued that there was no basis in fact for the appellant's claim that he had taken corrective action as outlined in the letter. He also argued that such a claim, if true, did not mean that the warning was improper, or that it should be removed from the appellant's personnel file. He asked the Board to find that the appellant's conduct was uncooperative, disruptive, and verbally abusive, and that such conduct warranted issuance of a written warning as the least severe form of discipline an appointing authority is authorized to use to correct an employee's unsatisfactory work performance.

Rulings of Law:

A. Per 1001.03 (a) (6) and (8) in effect at the time the warning was issued states:

"An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance for offenses including, but not limited to: ... (6) Exhibiting uncooperative or disruptive behavior; [and] ... (8) Exhibiting physically or verbally abusive behavior in the workplace..."

Decision and Order

Having considered the evidence, oral argument and offers of proof, the Board found that Mr. Flynn's conduct was uncooperative, disruptive, and verbally abusive, and that the appellant had received proper notice prior to the issuance of the warning that such conduct could lead to formal disciplinary action. Therefore, the Board found that the Fish and Game Department acted properly in issuing a written warning. The Board found that warnings need not be removed from an employee's file, or the effective period of such warning reduced, simply because the employee has taken, is taking, or intends to take the corrective action outlined in the warning. Similarly, the Board found that an agency should not be precluded from taking appropriate

disciplinary action simply because an employee apologizes for his/her improper conduct or poor performance. Therefore, the Board voted to deny Mr. Flynn's appeal.

In so doing, the Board also voted to direct the agency to implement its original offer for informal settlement by revising the letter to remove references to a prior letter of counseling. However, the agency may include language in the revised warning to indicate that he had been counseled about his behavior in the past.

THE PERSONNEL APPEALS BOARD



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Mark J. Bennett, Chairman



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Patrick H. Wood, Commissioner



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James J. Barry, Commissioner

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