

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of David Grandmont – Docket #2012-D-016

New Hampshire Department of Transportation

November 14, 2012

The New Hampshire Personnel Appeals Board (Wood, Bonafide, Johnson and Casey)¹ met in public session on Wednesday, October 24, 2012, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules to hear the appeal of David Grandmont, an employee of the NH Department of Transportation. The Appellant, who was represented at the hearing by Attorney Elizabeth Olcott, was appealing a written warning issued to him on October 27, 2011, under the authority of Per 1002.04(b)(2) of the NH Code of Administrative Rules, for allegedly failing to follow corrective actions and Per 1002.04(b) for failure to follow directives of supervisory personnel and/or more experienced personnel, resulting in safety infractions. Attorney Stephen LaBonte of the Attorney General's Office appeared on behalf of the Department of Transportation.

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

State's Exhibits

1. Grandmont Letter of Warning, October 27, 2011, with Attachments 1-14
2. Letter to Bill Lambert from Anthony L. King, November 18, 2011
3. Letter to Anthony King from Bill Lambert, December 9, 2011 and Proposed Amended Letter of Warning
4. Letter to Lyle "Butch" Knowlton" from Charlie McMahon, December 27, 2011
5. Letter to Charlie McMahon from Lyle W. Knowlton, January 24, 2012
6. Letter to David (Jeff) Brillhart from Charlie McMahon, February 3, 2012
7. Documents submitted by Mr. Grandmont in Step III Meeting
8. Letter to Charlie McMahon from David J. Brillhart March 1, 2012
9. Letter to Karen D. Hutchins from Charles McMahon, March 14, 2012
10. Proposed Amended Letter of Warning
11. Letter to Charles McMahon from Karen D. Hutchins, April 20, 2012

¹ The Board convened *en banc*. Neither party objected to any of the Commissioners present hearing and deciding the appeal.

Appellant's Exhibits

1. Notice of layoff, June 16, 2011
2. Notice of demotion in lieu of layoff, June 24, 2011
3. Notice of transfer back to prior position, October 20, 2011
4. Letter of warning, October 27, 2011
5. Notice of request for review, April 20, 2012
6. March 23, 2012, decision of the NH Supreme Court re: Appeal of Timothy Alexander and Appeal of New Hampshire Department of Health and Human Services²
7. Position description – Building Maintenance Supervisor

Having carefully considered the parties' evidence, arguments and offers of proof, the Board made the following findings of fact and rulings of law.

Findings of Fact

1. By letter dated June 16, 2011, the Appellant was notified that position #20245, Building Maintenance Supervisor had been abolished, and that because the Appellant was the least senior employee in that classification within his division, it was necessary to lay him off.
2. Although the Appellant's separation from service was to have been effective on June 30, 2011, the Appellant was notified by letter dated June 24, 2011, that he met the minimum qualifications for an available position of Highway Maintainer I in the Bureau of Traffic, and that he would be demoted in lieu of layoff into that position effective July 1, 2011.
3. The Appellant had no experience working as a Highway Maintainer, and he knew that accepting the demotion in lieu of layoff would result in a reduction in his wages. The Appellant also believed that he would be ineligible for unemployment compensation if he were to refuse the job.
4. Before assuming his new duties as a Highway Maintainer, the Appellant met with the appointing authority, William Lambert, Administrator of the Bureau of Traffic, and Eric Healy, the Pavement Marking Supervisor, to review the Appellant's new duties and responsibilities. The Appellant was informed that he might be assigned to a different pavement marking crew every day and would be receiving specific work assignments from the foreman, as well as instruction from the foreman or senior employees on the crew to which he was assigned, but that Eric Healy, the Pavement Marking Supervisor would be his overall supervisor.
5. Most of the Appellant's training in his role as a Highway Maintainer I occurred on the job.
6. Paint crews use signage to warn motorists of wet paint on the roadways and to advise motorists that there are painting crews in the vicinity. On July 26, 2011, working with a crew under the supervision of Mindy Boisvert, the Appellant improperly placed the signs, setting them at inappropriate distances and in some cases, facing in the wrong direction. He also placed some signs over the Massachusetts state border.

² The exhibit is identified in Appellant's letter dated October 18, 2012 as "In re Murdock (New Hampshire Personnel Appeals Bd.), 156 N.H. 732, 943 A.2d 757 (N.H. 2008)"

7. On August 1, 2011, while working on Ms. Boisvert's crew, the Appellant violated safety protocols by failing to wear a safety vest when he walked into a busy intersection to retrieve a bucket that had fallen into the roadway from the truck.
8. On August 17, 2011, while assigned to Patrick Sweet's crew and while driving the cone-drop truck, the Appellant missed the "break" in the road striping, and attempted to avoid driving over freshly painted lane markings by driving up on the traffic island instead. When he did, the truck impacted a sign and caused the glass from a side mirror to fall out. Although the Appellant was later allowed to return to retrieve the mirror so that it could be returned to its position on the truck, the Appellant did not report the incident until Mr. Sweet began explaining to him the potential dangers of driving up on the median.
9. On August 23, 2011, while working on Fred Shepard's crew, the Appellant violated safety directives that specify where crew members who are dropping and picking up traffic cones are to attach their safety lanyards to the cone truck. When a member of the crew told the Appellant how and where the safety lanyard was to be attached, the Appellant told his co-worker that he did not need to listen to the co-worker and the Appellant continued to attach the lanyard improperly.
10. On August 24, 2011, the Appellant was working on Mr. Sweet's crew as paint was being loaded onto the truck. For safety reasons, because the paint is loaded under pressure, valves need to be opened in a certain order to avoid accidents and possible injuries. The Appellant began opening valves without consulting his fellow crew member. When that employee attempted to correct the Appellant, the Appellant responded that the employee did not have a right to correct him. By ignoring the more experienced co-worker, the Appellant was in violation of Administrator Lambert's instruction to listen to co-workers who had more experience on the job.
11. On August 26, 2011, the Appellant met with Mr. Healy and Mr. Lambert to discuss concerns that had been raised by the various foremen to whom the Appellant had been assigned.
12. On September 1, 2011, the Appellant was assigned by Ms. Boisvert to do flagging after the Appellant complained that he had injured his back while placing traffic cones. While carrying out the flagger's duties, the Appellant had to be reminded repeatedly to turn the paddle to "follow" or "pass." Because the Appellant had to be supervised constantly and reminded to turn the paddle, Ms. Boisvert reassigned him to drive the truck. The Appellant proceeded to drive through a red light. He also failed to maintain a consistent speed while driving the vehicle, making it difficult for employees to work safely from the back of the truck.
13. Administrator Lambert issued a written warning to the Appellant on October 27, 2011. One day later, on October 28, 2011, the Appellant was returned to the Maintenance Supervisor position from which he had been demoted in lieu of layoff in July.

Rulings of Law

- A. In appeals arising out of the issuance of a written warning, the appointing authority has the burden of, "producing evidence supporting the action under appeal," [Per-A 201.12(b)] The weight of the evidence in the instant appeal supports the Department of Transportation's decision to issue a written warning to the Appellant.
- B. In all cases, the Appellant has the burden of proof. In this instance, the Appellant failed to persuade the Board that, "(1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence." [Per-A 207.12 (a)(1)-(4)]

Position of the Parties

Attorney Olcott argued that the written warning, which was issued to the Appellant one day before he was reassigned to his old position as a Maintenance Supervisor, was not corrective in nature, but was intended instead to be punitive. Attorney Olcott argued that Administrator Lambert and the various supervisors to whom the Appellant was assigned between July 1, 2011 and October 27, 2011, were hostile to the Appellant and did not want him working on their crews. Attorney Olcott argued that on the first day that the Appellant reported to his position as a Highway Maintainer, Administrator Lambert let the Appellant know that "he was not wanted." Attorney Olcott argued that Ms. Boisvert told the Appellant the same thing, and that throughout his assignment to the Bureau of Traffic, the Appellant was forced to work in an abusive environment.

Attorney Olcott argued that the Appellant was never properly trained, characterizing the only instructions he received as "monkey-see, monkey-do." By way of example, Attorney Olcott argued that the Appellant's method of attaching his safety lanyard was similar to that of some of the Appellant's co-workers, and that none of them were disciplined for doing exactly what the Appellant had done. Attorney Olcott argued that after the Appellant injured his back performing work for which he had received no formal training, his supervisors and fellow crew members became even more hostile toward him.

Attorney Olcott argued that the timing of the warning was highly suspicious, since it was issued just one day before the Appellant was returned to his former position. Attorney Olcott noted that the warning was not issued until nearly two months after the last of the reported incidents of unsatisfactory work. She also argued that the corrective action plan outlined in the warning was directed toward assignments as a Highway Maintainer and had nothing to do with the Appellant's assignments as a Building Maintenance Supervisor.

Attorney Olcott argued that the Appellant had little opportunity to learn the job, as the agency kept shuffling him from one assignment to the next. Attorney Olcott argued that the April 20, 2012, letter from Personnel

Director Karen Hutchins seemed to acknowledge the "uniqueness of the situation," noting that Director Hutchins said it appeared the Appellant may not have received adequate training.

Attorney LaBonte argued that the majority of training for Highway Maintainer positions occurs on the job. He argued that the infractions noted in the warning are not training issues, but issues involving safety violations and violation of instructions from a supervisor. Attorney LaBonte argued that the Appellant was not written up for the mistakes he made, but for doing things his supervisors had not told him not to do. Attorney LaBonte argued that the corrective action plan could apply to anyone working at the Department of Transportation, as safety is everyone's business. Attorney LaBonte argued that although the Appellant allegedly saw co-workers committing safety infractions, such as how or where they attached their safety lanyards, that did not excuse the Appellant from ignoring supervisory directives on that very subject.

Attorney LaBonte argued that the corrective action plan detailed in the written warning addresses the Appellant's attitude of disagreeing and not listening to his supervisor, making the wrong decisions repeatedly, and not paying attention to hazards in the workplace. Attorney LaBonte argued that while there may be different hazards for Highway Maintainers than there are for Building Maintenance Supervisors, every job has hazards, and the corrective action plan in the warning would apply to the Appellant's new job as easily as it did to his old job.

Attorney LaBonte argued that throughout the period of Mr. Grandmont's assignment to the Bureau of Traffic, the agency conducted itself in a manner that was lawful and consistent with the Rules of the Division of Personnel. Attorney LaBonte asked the Board to consider the written warning in light of the various infractions committed by the Appellant between July 1 and September 1, 2011, and noted that each of the infractions involved safety issues and the Appellant's failure to adhere to departmental safety policies. Attorney LaBonte noted that the Appellant had the burden of proving that the written warning was unlawful, inappropriate or unfair, and asked the Board to find that the written warning issued to the Appellant was the appropriate level of response based on the totality of the circumstances.

Decision and Order

The Appellant attributed his difficulties in the Bureau of Traffic to lack of training and hostility and resentment directed at him by management and members of the crews. The Board disagrees. It is not surprising that personnel in the Traffic Bureau were frustrated by the Appellant's tendency to challenge directions he received from his supervisors, and his reluctance to learn from the experience of his co-workers, particularly when the Appellant's independent decisions and actions compromised safety standards and the quality of the work performed. Despite the Appellant's assertion that he was unwanted when he arrived in the Bureau of Traffic, and that Mr. Lambert, Mr. Healy and the various painting crew supervisors were hostile toward him, the documents submitted as attachments to the written warning are more indicative of supervisors being

concerned for the safety and well-being of their crews, and their belief that the Appellant was not retaining enough of the information provided to him in order for him to function effectively, cooperatively and safely as a Highway Maintainer I.

Similarly, the Board is not convinced that the foremen and crew members resented the Appellant's appointment to the position of Highway Maintainer as much as they resented being told repeatedly by the Appellant that he did not have to listen to them or take direction from anyone other than Mr. Healy. The Appellant's reliance on his lack of training as a defense of his actions under these circumstances is not persuasive. The evidence reflects that most training occurs on the job, and that the Appellant had been directed to listen to the more seasoned members of the crew. He chose not to.

For all the reasons set forth above, the Board voted unanimously to uphold the written warning and to DENY Mr. Grandmont's appeal.

In reviewing the evidence, the Board noted that at Step IV of the informal settlement process, Personnel Director Hutchins recognized that the Appellant's level of training and experience may have differed from that of his co-workers, and she decided that if the Appellant committed no similar violations in a year's time, the agency should remove the written warning from the Appellant's file on or about October 27, 2012. The Appellant declined that proposed resolution and chose to pursue an appeal instead. Had he accepted the Director's decision at Step IV, the written warning would already have been removed from his file along with all other references to the discipline. Having rejected that resolution, however, the warning will now remain in the Appellant's file and be effective for five years from the date of issue.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick Wood, Chair



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151 Robert Johnson - mas

Robert Johnson, Commissioner

151 Joseph Casey - mas

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Elizabeth Olcott
Attorney Stephen LaBonte
Frances DeCinto, HR Administrator, Dept. of Transportation