

# State of New Hampshire



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

## **APPEAL OF RUSSELL HOBBY – 2007-D-003**

**Department of Safety**

**May 30, 2008**

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, August 15, 2007, 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 Russell Hobby, an employee of the Department of Safety. Mr. Hobby, who was represented at the hearing by Thomas Tardif, was appealing a letter of warning issued to him on November 15, 2005.<sup>1</sup> Attorney Marta Modigliani appeared on behalf of the Department of Safety. The Board heard the appeal on offers of proof by the representatives of the parties.

The Chairman indicated the under the Board's rules, exhibits had to have been submitted the week prior to the hearing, noting that although these were hearings on offers of proof, the same process for exchange of documents still applied. Attorney Modigliani said that Mr. Tardif had been on vacation, so they were unable to meet until the Thursday prior to the hearing. Nevertheless, she argued, the appellant did not provide copies of his exhibits until the day of the hearing.

The record of the hearing in this matter consists of the audiotape recording of the hearing on the merits of the appeal, notices and orders issued by the Board, and the following documents, including those that were admitted into evidence.

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<sup>1</sup> The appellant had requested informal settlement of the warning. A decision of the Director of Personnel was not issued until January 10, 2007, giving rise to the appeal pending before the Board.

Appellant's Motion for Contempt

Appeal of the letter of warning (taken from Motion for Contempt)

Letter from the Board concerning jurisdiction

State's response to appeal of letter of warning

Motion for Summary Judgment filed June 5,2007

State's objection to Motion for Summary Judgment June 8,2007

Prehearing conference statement August 6,2007

List of exhibits filed by appellant, dated August 9,2007

State's exhibits 1-20, submitted August 10,2007

1. January 10,2007 Correspondence from Director Levchuk
2. Step III Response from Commissioner Flynn
3. Step II Response from Director Cheney
4. January 23,2006 Correspondence from Mike Geary
5. January 11,2006 Correspondence from Mike Geary
6. January 11,2006 Reissued Letter of Warning
7. November 15,2005 Letter of Warning
8. November 15,2005 Correspondence fi-om Mike Geary
9. December 13,2005 Correspondence from SEA
10. October 17,2005 Correspondence from Director Levchuk to Mike Geary
11. October 17,2005 Correspondence from Director Levchuk to Mr. Hobby
12. June 21,2005 Correspondence from Mike Geary
13. Performance Evaluation ending 3/28/05
14. March 7,2005 Memo to Russell Hobby
15. June 9,2004 Correspondence to SEA
16. May 10,2004 Letter of Warning (Revised)
17. May 10,2004 letter of Warning
18. Acknowledgment of Policy on Sexual Harassment
19. Acknowledgment of Policy on Workplace Harassment
20. Summary of Communication of 4/12/04

Appellant's exhibits 1, 2, 4, 5, 7, 8, 9, 10, 14, and 15

1. June 21,2005 notice of suspension with pay
2. Director Levchuk's letter re: Investigation No. 05DP-23-02
3. September 16,2006 Complaint Investigation (**excluded**)
4. October 17,2005 letter from Director Levchuk to Russell Hobby
5. October 17,2005 letter from Director Levchuk to Michael Geary
6. pages 105-107 of a transcript of a Workers Compensation hearing (**excluded**)
7. November 15,2007 Written Warning
8. December 15,2005 letter fi-om Margo Steeves regarding Mr. Hobby's leave
9. January 23,2006 letter from Michael Geary to Margo Steeves
10. February 17,2006 letter from Bruce Cheney to Margo Steeves
11. March 6,2006 letter to Russell Hobby (**excluded**)
12. Unsigned letter dated March 13,2006 from Robert Brown to Russell Hobby  
**(excluded)**
13. Unsigned letter dated June 26,2006 from Robert Brown to Russell Hobby  
**(excluded)**
14. January 10,2007 letter from Karen Levchuk to Jean Chellis
15. March 19,2007 Superior Court Order on Right to Know Petition
16. Photocopy of Title VII, Chapter 106-H, Enhanced 911 System

Mr. Tardif argued that the Board had the authority to waive the rule regarding timely disclosure of exhibits to be offered at the hearing, but indicated that he could work with those documents provided to him by the State and those of the appellant's that the Board agreed to admit into evidence. Mr. Tardif asked the Board to note his objection to the date of the warning, saying that it was dated November 15,2005, but not received by the appellant until November 30,2005.

Mr. Tardif argued that a written warning was inappropriate because Ms. Joyce, the female co-worker whose complaint about Mr. Hobby formed the basis of the written

warning, never told the appellant that any of his behavior made her uncomfortable. He argued that after the State investigated the complaint and was advised that the appellant had not violated the Sexual Harassment Policy, the State had no right to act upon any of the information obtained during the course of that investigation. Finally, he argued that the written warning issued to the appellant was retaliatory and was a direct result of a Workers Compensation claim that the appellant filed.

Attorney Modigliani argued that although investigators concluded that the appellant's behavior did not violate the State's sexual harassment policy, the investigation clearly indicated that Mr. Hobby had engaged in inappropriate, unprofessional behavior. She argued that the State did have a right and an obligation to address Mr. Hobby's conduct, which violated both the Rules of the Division of Personnel and the Department's professional conduct policy. Ms. Modigliani reiterated that there was no instructor/student relationship between Mr. Hobby and Ms. Joyce, and that until the hearing, there had never been a suggestion by the appellant that such a relationship ever existed. Ms. Modigliani indicated that Ms. Joyce was under no obligation to confront Mr. Hobby directly if she found his behavior to be intimidating. Finally, Ms. Modigliani argued that the appellant's Workers Compensation claim was denied, and it had absolutely nothing to do with the written warning. She argued that in terms of the timing of the warning, there was approximately a month between the conclusion of the investigation and the Department's receipt of Personnel Director Levchuk's letter, and about one more month before the letter itself was issued.

After hearing the parties' offers of proof and reviewing the documents admitted into evidence, the Board made the following findings of fact and rulings of law:

Findings of Fact:

1. Mr. Hobby was hired on March 1, 2002 as a full time Data Control Clerk III with duties and responsibilities as outlined in his supplemental job description (attached to the performance evaluation admitted as State's Exhibit 13)

2. Mr. Hobby had a history of poor evaluations, formal written warnings and counseling in addition to the letter of warning dated November 15, 2005 (State's 7) that was issued to the appellant by Michael Geary.
3. On or about June 16, 2005, one of Mr. Hobby's female co-workers complained that Mr. Hobby's behavior was inappropriate and intimidating. She indicated that Mr. Hobby would stand in her office watching her without saying anything, and that he would sometimes stand behind her chair, bumping into her. She described the behavior as making her uncomfortable.
4. As a result of the complaint, Mr. Geary contacted Personnel Director Karen Levchuk, who recommended that Mr. Hobby be administratively suspended with pay pending the outcome of an investigation of possible sexual harassment.
5. A harassment investigation was undertaken by the Division of Personnel and completed in the fall of 2005. The Director of Personnel sent letters to Mr. Geary and Mr. Hobby (State's 10 and 11) explaining the result of the investigation.
6. In her letter to Mr. Geary, the Director of Personnel noted that there had been two previous harassment complaints involving Mr. Hobby's conduct with female co-workers, and while his conduct did not rise to the level of sexual harassment, there was sufficient evidence of improper behavior with females in the workplace to warrant a written warning for inappropriate workplace conduct.
7. The requirement for maintaining professional behavior in the workplace is well known in the Bureau of Emergency Communications, and all new employees receive copies of the bureau's policy on courtesy and professionalism. (Exhibit 15). Mr. Hobby received a copy of the policy manual and he was given the policy again after a warning that was issued to him in 2004 after a co-worker complained that Mr. Hobby had engaged in unsolicited hugging, rude mannerisms, and an invasion of personal space (State's 20).
8. Despite prior discipline and repeated coaching and counseling, Mr. Hobby continued to engage in behavior that made his female co-workers uncomfortable, such as that which Ms. Joyce described in her complaint.
9. Although Ms. Joyce never told Mr. Hobby personally that his conduct intimidated her and made her feel uncomfortable, she was under no legal obligation to do so.

10. In her October 17, 2005 letter to Mr. Geary, Director Levchuk wrote, "As you will note, the investigators have recommended that Mr. Hobby receive a letter of counsel setting forth expectations about appropriate interactions with co-workers and acceptable conduct in the workplace. Given that there have been two prior occurrences of inappropriate behavior reported by female colleagues over the course of the last two years, I am concerned that this may not be sufficient to drive home the message to Mr. Hobby. Under these circumstances, I think that you might wish to consider a letter of warning for failure to meet the work standard pursuant to Per 1001.03" (State's 10).
11. The written warning dated November 15, 2005 and reissued January 16, 2006, informed the appellant that, "Although the outcome of this investigation came to the conclusion that you were not in direct violation of the State's Sexual Harassment Policy, you were in fact found to be in violation of the State's Personnel Rules Per 1001.03(a) Failure to Meet the Work Standard by displaying inappropriate behavior with a female co-worker in the work place. This is the third time we have had to address your inappropriate behavior with female co-workers" (State's 6).
12. Although Mr. Hobby characterized his relationship with Ms. Joyce as an instructor/student, and indicated that when he watched her or stood near her chair it was for instructional purposes so that he could observe her and improve his own work, there was no evidence to suggest that their relationship was anything other than that of co-workers engaged in similar tasks.
13. Among the work standards established for Mr. Hobby's position is, "Ability to establish and maintain harmonious relationships with others." (State's Exhibit 13).
14. There's no dispute between the parties with regard to the material facts, including the fact that Mr. Hobby did stand in Ms. Joyce's cubicle and watch her without speaking to her, that he bumped into her chair while standing behind her, and that Ms. Joyce found the behavior intimidating.
15. There is no dispute that Mr. Hobby had been counseled repeatedly about his inappropriate interactions with female staff in his workplace.

Rulings of Law:

- A. Former Per 1001.03 (a) in effect at the time the warning was issued to the appellant provided that an appointing authority is authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct for offenses including failure to meet any work standard.
- B. RSA 21-I:58, I, provides in pertinent part, "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:

Having carefully considered the offers of proof, evidence and argument offered by the parties, the Board found that the Department of Safety was justified in issuing Mr. Hobby a written warning for failure to meet the work standard by displaying inappropriate behavior with female co-workers. The evidence reflects that Mr. Hobby made one of his female co-workers so uncomfortable that she filed a sexual harassment complaint, and although the behavior confirmed by the investigators in that complaint may not have been so severe or pervasive to be considered sexual harassment, it was nevertheless inappropriate and unprofessional. Given the number of times the appellant had been warned and counseled about his interactions with others in the workplace, the Department took the least severe form of discipline possible by issuing him a written warning for that conduct. The Board considered whether there were mitigating factors that would warrant changing or modifying the order of the appointing authority, but found that the written warning was justified by the facts in evidence.

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

THE PERSONNEL APPEALS BOARD

/s/

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Patrick Wood, Chairman

/s/

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Robert Johnson, Commissioner

/s/

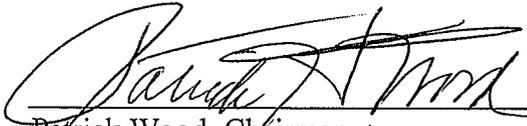
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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel  
Thomas Tardif, Representative  
Attorney Marta Modigliani

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