

# State of New Hampshire



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

Appeal of Thomas Jelley  
Docket #2008-D-006  
Department of Transportation  
January 2, 2009

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, October 29, 2008, 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 Thomas Jelley, an employee of the NH Department of Transportation, Bureau of Mechanical Services. Mr. Jelley, who was represented at the hearing by SEA Grievance Representative Nicholas McGinty, was appealing a letter of warning issued to him on June 22, 2007 under the provisions of Per 1002.04(b)(1) for failure to meet any work standards, and Per 1002.06(a)(3)h for any offense listed under Per 1002.08, specifically Per 1002.08(b)(12), falsification of any agency records received, maintained or utilized by the agency. Assistant Attorney General Lynmarie Cusack 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 notices and orders issued by the Board, pleadings submitted by the parties, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibit 1 – 323 Bates stamped pages<sup>1</sup> including the June 22, 2007 written warning and Mr. Jelley's written response thereto

Appellant's Exhibit A – Appellant's Statement of Proof with attachments 1-172

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<sup>1</sup> Page 232 is intentionally blank, and serves as a divider between the State's evidence supporting the warning and the Appellant's response thereto.

<sup>2</sup> The document identified as Appellant's Statement of Proof refers to 20 numbered attachments. However, only 17 attachments were presented at the hearing on October 29, 2008.

The warning issued by Lyle Knowlton, Director of Operations, alleged that the appellant failed to meet the work standard as a result of his "overall failure to supervise." "Specifically," Mr. Knowlton wrote, "there is documentation of [the appellant's] unprofessional and uncooperative communications, [his] failing to properly implement Department safety programs and [his] failure to monitor and control workplace conduct within [the appellant's] bureau.." The warning also alleged that the appellant misrepresented facts that later appeared in a written warning issued to one of his employees, and that such misrepresentation constituted falsification of any agency records received, maintained or utilized by the agency. In the warning Mr. Knowlton wrote, "The related financial and medical damages occurring to this employee as a result of your own misconduct in relation to this matter is egregious. But for your many years of employment, you would be dismissed for this offense." (State's 1, pp. 1-14)

Mr. McGinty described the warning as an 11-page document<sup>3</sup> that spanned a couple of years, covered several different issues and included "everything and the kitchen sink." Mr. McGinty described the appellant as a long-term employee who had never been disciplined or counseled in his thirty-three years of employment. He argued that if the issues in the warning were serious enough to warrant the issuance of an eleven-page warning, there first should have been some evidence of counseling or requirements for the appellant to take some form of corrective action. Mr. McGinty described Mechanical Services as a very large bureau with locations and services statewide, noting that the appellant's duties and responsibilities extended well beyond the welding shop where the problems specific to the warning were described. He argued that the appellant was not ignoring the problems developing in the welding shop, noting that the appellant had "reached out" repeatedly to the Human Resources Bureau for assistance in dealing with one employee in particular whose behavior was disruptive and whose complaints were frequently viewed by the appellant and others as "frivolous." Mr. McGinty argued that it was unreasonable for the department to hold the appellant solely responsible for problems escalating in the welding shop when the department itself ignored the chain of command and allowed that employee to file his complaints directly and repeatedly with the Health and Safety Officer and/or the Human Resources Bureau without apprising the appellant of the complaints,

Ms. Cusack described the appellant as a high-level administrator responsible for overall management of the Bureau of Mechanical Services, with a \$14 million budget and a staff of 86 full-time employees deployed statewide. Ms. Cusack said that the appellant's office is located in the same building as the welding shop, one of the work areas under the appellant's management and supervision, and that when problems began to develop between employees in that shop, the appellant should have taken responsibility to deal immediately and directly with those employees before the issues escalated. Instead, she said, the appellant allowed an unsafe and hostile work environment to

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<sup>3</sup> The warning included in State's Exhibit 1 is 14 pages in length.

develop. Ms. Cusack argued that appellant's "failure of leadership," including his failure to provide appropriate supervision to subordinate managers and employees in the shop, exacerbated hostile relations that had developed between co-workers and lead directly to complaints by one of the employees and a series of internal investigations on issues ranging from workplace safety and employee harassment to possible civil rights violations. Ms. Cusack argued that the department did counsel the appellant, describing "long walks" and "car rides" that Mr. Knowlton employed to counsel the appellant. She argued that when the appellant failed to take appropriate corrective action, and later engaged in what appeared to be retaliation by disciplining the employee who was making all the complaints, the Department took the least severe form of discipline by issuing the appellant a written warning.

Having reviewed the documentary evidence and having considered the arguments and offers of proof presented by the parties, the Board made the following findings of fact<sup>4</sup> and rulings of law:

Findings of Fact:

1. The appellant has worked for the Department of Transportation since 1973, serving as the Administrator of the Bureau of Mechanical Services, labor grade 33, since July 20, 1984. The bureau has numerous locations statewide, and the appellant is responsible for overall supervision of eighty-six Class 10 full-time employees assigned throughout the State. (State's offer of proof)
2. According to the supplemental job description, the appellant "Performs highly responsible administrative duties in directing overall activities within the Bureau of Mechanical Services in the Department of Transportation," and is responsible for "Direct[ing] all activities of central and satellite garages including maintenance of inventory control systems for parts, supplies and equipment to maintain level of support to bureaus, districts and other agencies." (States 1, p. 16)
3. On February 24, 2005, David Grandmont, an employee of the Mechanical Services Bureau, contacted the Department of Transportation's Human Resources Bureau to complain about co-worker conduct in the welding shop that allegedly violated workplace health and safety standards. His complaints included use by a co-worker of an unauthorized aerosol spray that caused Mr. Grandmont and a co-worker significant physical discomfort, an employee welding without wearing a respirator or using his vacuum fan, and another employee getting into a shoving match and threatening to kill one of his co-workers. Mr. Grandmont alleged that infractions such as those were common, but that neither the appellant nor any of his subordinate

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<sup>4</sup> Most of the documents included in State's Exhibit 1 also appear in Appellant's Exhibit A. Where documents appear in both parties' exhibits, the Board generally has chosen to refer to the documents in State's Exhibit 1, as they are more easily located by page number than they are as attachments to Appellant's Exhibit A.

supervisors did anything to correct the problems. According to Mr. Grandmont, the problems had persisted for more than a year (State's 1, pp. 18-22)

4. On or about February 25, 2005, the appellant and Mr. Grandmont were leaving the building at the same time. When the appellant held the door for Mr. Grandmont, Mr. Grandmont called the appellant "a scholar and a gentleman," to which the appellant responded, "And you're a f\_\_\_ing liar." (State's 1, p. 3) Although the appellant insists that the remark was made in jest and was intended to poke fun at himself, as if to say "I'm no gentleman," Mr. Grandmont found the remark offensive.
5. After completing an intake interview and preliminary review of Mr. Grandmont's February 25, 2005 complaint, the Department concluded that there were no EEO violations, but instructed Mr. Grandmont in a "letter of closure" dated March 22, 2005 that if the behaviors persisted or became severe, he should inform his appointing authority or notify Mr. Chandler, the Chief of Labor Compliance, directly. (State's 1, p. 23).
6. Mr. Grandmont returned to the Human Resources Bureau on June 27, 2005 to complain that employees in the welding shop were not wearing their respirators, employees were disrupting the workplace by repeatedly opening and closing the shop's bay doors, a co-worker had grabbed Mr. Grandmont by the throat and made a rude and threatening comment, the shop Safety Coordinator had not responded to Mr. Grandmont's concerns about employees using tinted welding shields, and a co-worker had warned Mr. Grandmont that other employees in the shop were involved in a "conspiracy" against Mr. Grandmont. (State's 1, p. 3)
7. On July 29, 2005, Ms. Buczynski and Ms. Cook met with the appellant and provided him with copies of notes that Mr. Grandmont had been keeping and had submitted to human resources about the situation in the welding shop. According to the written warning, after having been apprised of Mr. Grandmont's concerns, the appellant was expected to "...take appropriate corrective action on the safety and conduct issues," but failed to do so. (State's 1, p. 3)
8. Mr. Grandmont contacted Ms. Cook in human resources again on September 21, 2005 with additional complaints about conduct in the workplace. Although Ms. Cook directed Mr. Grandmont to work with his bureau administrator and safety coordinator before coming to Human Resources to get workplace problems resolved, Mr. Grandmont returned to Human Resources two days later complaining that nothing had been done to address his concerns. Mr. Grandmont repeated his earlier complaints about the way in which he was being treated, and advised the staff in Human Resources that when he observed one of his co-workers leaving the building with a state vehicle, another co-worker told him that the employee was delivering a stainless steel grill to the appellant's home after having spent the entire workweek fabricating the grill in the welding shop. (State's 1, p. 4)
9. On September 25, 2005, Ms. Buczynski notified the appellant by phone that her office planned to conduct a safety audit at the appellant's bureau. The following day, the appellant issued Mr. Grandmont a letter of

counsel, instructing him to contact supervisors in his own bureau instead of personnel in human resources if he had any safety concerns. (State's 1, p. 5)

10. In a confidential memo dated November 11, 2005 addressed to Lyle Knowlton, Director of Operations, Ms. Buczynski, the Director of Human Resources, explained that since February, 2005, her Bureau had received a series of complaints from Mr. Grandmont about alleged safety violations in the Welding Shop, as well as allegations that Mr. Grandmont had been mistreated for making the complaint. She wrote, "The situation continues to escalate and I am less and less confident of resolution internally and more and more prepared for involvement of an outside party such as the Labor Department, Human Rights Commission, or some form of legal action." She explained that her bureau had "initiated various remedial strategies, including conducting investigations, safety audits, supervisory support services, documenting employee complaints of mistreatment and forwarding to the Appointing Authority [Thomas Jelley] for resolution." Ms. Buczynski indicated that although the aforementioned safety audits were conducted with prior notice to the appellant, he and his staff had not been cooperative. She wrote, "You may recall there was some resistance from Mr. Jelley and Brian Pike, at the time of the audit inspections with regard to allowing access to documentation." Ms. Buczynski forwarded the audit reports to Mr. Knowlton advising him, "It is my opinion that there are more areas of nonconformance than one would expect to find with a dedicated safety and environmental staff position in that bureau. You and Tom [Jelley] may want to address that as a performance issue with the dedicated safety staff person." She also asked Mr. Knowlton for assistance "in creating a forum for discussion with Mr. Jelley of the audit results with a focus on corrective measures." (State's 1, p. 49)
11. On November 23, 2005, Mr. Knowlton conducted a "closure meeting" with the appellant to review the findings of the safety audit conducted at the Stickney Avenue facility on October 4 - 5, 2005 shop by Health and Safety Officer Colleen Cook and Workers Compensation Agent Alexis Martin. HR Administrator Frances Buczynski attended the meeting as well. The appellant's reaction was sufficiently hostile and unprofessional that Ms. Buczynski and Ms. Cook left before the meeting concluded. (State's 1, p. 6, and State's offer of proof)
12. By memo dated December 12, 2005 addressed to Mr. Knowlton, the appellant responded to the statements in Ms. Buczynski's November 11, 2005 confidential memo, writing, "You are aware that an individual in our Welding Unit has been making numerous allegations of safety violations within his unit... I do not feel that I have been kept informed of this individual's complaints by any means. He has been allowed and even encouraged to bring his issues directly to the Health and Safety Office." The appellant indicated that the Health and Safety Officer failed to notify him when Mr. Grandmont complained about the use of unauthorized aerosols in the workplace, and said that he acted swiftly as soon as he learned that the employee had seen a physician and had a doctor's note advising him to avoid aerosols. "I called for the

elimination of all aerosols immediately," the appellant wrote, "and to identify the one that the individual had a reaction to. The aerosol brought to me was Lysol." The appellant wrote that a few days later, when the Health and Safety Officer asked him for a material safety data sheet, he believed, and advised Ms. Cook, that the problem had already been resolved. He indicated that when Ms. Cook persisted and mentioned that the department was just trying to protect itself with "this other thing," he knew there was more information being withheld from him. He indicated that he subsequently apologized to Mr. Grandmont for the way the complaint had been handled from the outset, and he asked Mr. Grandmont to come directly to him in the future if there was any unresolved issues. The appellant went on to discuss the bureau's safety record, but also asked Mr. Knowlton to note that the safety audit conducted by the Health and Safety Officer did not conform to the Department's procedures for conducting an audit. (State's 1, pp 77-78)

13. By letter dated November 18, 2005, Ms. Buczynski notified the appellant that the Department had contracted the services of an independent investigator to look into allegations that an employee under the appellant's supervision, on state time and using state equipment, made a grill and delivered it to the appellant's home for his personal use. (State's 1, p. 107)
14. On December 7, 2005, the appellant issued Mr. Grandmont a five-page written warning, advising him that his salary increment would be withheld as a result of his overall rating of "below expectations" on his performance evaluation. The warning described incidents involving an improper lift of a "dump body," damage to an attached ladder, and allegations that Mr. Grandmont had tried to cover-up the fact that he had damaged the equipment." (State's 1, pp. 110-114)
15. A subsequent investigation disclosed that there was no real damage, that ladders on other dump bodies appeared to have been bent at the time of delivery, that Mr. Grandmont had taken appropriate steps to ensure the ladder was usable, and that he had kept his supervisor apprised of his actions. (State's 1, p 221)
16. On December 12, 2005, the appellant filed a written response to the Safety Audit that had been conducted at the Stickney Avenue shop two months earlier. In his response, the appellant stated that he had not been advised of Mr. Grandmont's complaints when they were received by the Health and Safety Officer, that he had taken appropriate steps to resolve complaints that were brought to his attention, that the safety audit did not conform to DOT policies and procedures, and that the department itself was partially responsible for areas of non-conformance with respect to safety training, as it had not arranged for training the appellant had requested for his staff. (State's 1, pp 77-81)
17. On July 26, 2006, HR Administrator Buczynski notified Jay Ankenbrok, External EEO Coordinator at the Department of Transportation, that she had received a complaint from David Grandmont. The intake interview summary (State's 1, pp. 154-163) includes a series of allegations by Mr. Grandmont of safety violations, misconduct, harassment by co-workers, and retaliation by the bureau administrator.

18. As a result of the various Grandmont complaints, the Department of Transportation conducted a series of investigations between February 2005 and July 2006 including a safety audit, a sexual harassment investigation, and an investigation into Mr. Grandmont's report of a grill being built for Mr. Jelley by a State employee on State property and State time. Although the latter investigation cleared the appellant of any wrongdoing, the Department concluded that the appellant was responsible for allowing employees to taunt Mr. Grandmont by intentionally misrepresenting the situation, creating the perception that employees from the welding shop were working on a personal project for the appellant on State time, using State resources in a State facility. (State's 1, p. 7)
19. On October 10, 2006 the appellant issued a second written warning to Mr. Grandmont for allegedly engaging in inappropriate, uncooperative and disruptive behavior in the workplace and for threatening the safety of another worker. The letter addresses a series of interactions between Mr. Grandmont and his co-workers, particularly as they related to Dennis Frost. (State's 1, pp.185-189)
20. The last investigation was summarized in a report dated November 7, 2006 completed by Investigator Thomas Sexton. In that report, Mr. Sexton wrote, "The focus of my investigation does not concern the many conflicts that GRANDMONT has had with his co-workers. Rather, it mainly concerns GRANDMONT'S contention that his administrator, Thomas Jelley, Administrator, Bureau of Mechanical Services, is retaliating against him for a complaint that GRANDMONT brought against JELLEY on September 23, 2005 concerning a barbecue grille, and a complaint that JELLEY is fabricating evidence against GRANDMONT concerning damage to a ladder that occurred on September 29, 2005, in an attempt to cause GRANDMONT'S dismissal from State employment." (State's 1, p. 201)
21. In his report, Mr. Sexton concluded that there were false accusations against Mr. Grandmont in the December 7, 2005 letter of warning, but that it was impossible to determine if the appellant made the false charges in retaliation for some or all of Mr. Grandmont's earlier conduct, or if the false charges were simply the result of a miscommunication between the appellant and the author of the warning, Bonnie Berry. (State's 1, p. 222)
22. In a supplement to the investigation, dated December 4, 2006, Mr. Sexton revised his original conclusions, finding that the charges Ms. Berry wrote into the December 7, 2005 warning were all but identical to text in the appellant's emails to Ms. Berry outlining the charges he expected her to insert in the Grandmont warning. Mr. Sexton concluded, "Since there was no miscommunication between Jelley and Berry on this issue, there was either a miscommunication between Cotton-Moore-Jelley [the appellant and his subordinate supervisors in the shop], or else Jelley deliberately gave false information to Berry for the Letter of Warning." (State's 1, p. 224)

23. By memo dated May 29, 2007 addressed to Mr. Knowlton, the appellant responded to what he described as the "various investigations" undertaken against [him]." In response to charges that there were outstanding corrective actions as a result of the safety audit he wrote, "The following is my response to our October 2005 Safety Audit in its entirety. We were recently informed that there were outstanding corrective actions with this audit, but we submitted the response to you in December 2005 and were never told of anything missing until your memo of May 8, 2007." (State's 1, p. 239) The appellant's original response was sent to Mr. Knowlton. Mr. Knowlton could have, but did not, forward the document to Ms. Cook. (Appellant's offer of proof)
24. Operations Director Lyle Knowlton issued the appellant a written warning dated June 22, 2007.

Rulings of Law:

- A. Per 1002.04 (a) of the NH Code of Administrative Rules authorizes appointing authorities to issue written warnings as the least severe form of discipline to correct an employee's unsatisfactory work performance or conduct.
- B. Per 1002.08 (b) of the NH Code of Administrative Rules permits an appointing authority to dismiss an employee without prior warning for various offenses including falsification of any agency records received, maintained or utilized by the agency. (Per 1002.08 (b)(12).
- C. In accordance with Per 1002.03, "In determining the appropriate form of discipline under Per 1002.04 through 1002.08, an appointing authority may consider factors including, but not limited to: (a) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the functions of the agency; and (b) The employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense."
- D. According to Per-A 207.12 (b) of the Board's rules, "In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence 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."

- E. RSA 21-I:58, I states, 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 "

Discussion:

In November 2005, the Director of the DOT's Bureau of Human Resources provided detailed written notification to the Director of Operations and the Director of Administration that significant personnel problems in Mechanical Services had been developing since at least February of 2005, including repeated reports of health and safety violations, threats, harassment by co-workers, and retaliation against the employee making the complaints. In the ensuing eighteen months, the appellant and his bureau were the subject of several different investigations including a health and safety audit, harassment and retaliation investigations, and investigation of an alleged ethics violation concerning possible theft of goods and services. The June 22, 2007 written warning describes each of those issues in detail and accuses the appellant of an "overall failure to supervise." "Specifically," the letter states, "there is documentation of your unprofessional and uncooperative communications, your failing to properly implement Department safety programs and your failure to monitor and control workplace conduct within your bureau." Unfortunately, despite what Ms. Cusack described as "long walks" and "car rides" during which Mr. Knowlton reportedly would discuss the appellant's poor work performance and lack of leadership, there is little evidence that concerns about the appellant's work performance between February 2005 and June 2007 were addressed with the appellant in any meaningful fashion until the warning was issued.

RSA 21-I:42 XIII (b) requires performance evaluations to be completed at least once annually. Mr. Jelley's last performance evaluation prior to his receipt of the June 22, 2007 written warning covered a 21-month period, from March 9, 2005 to January 9, 2007. While the written warning describes in minute detail a number of events occurring throughout approximately the same period of time covered by the evaluation, the evaluation itself makes no reference to the conflicts, complaints or investigations involving the appellant's Bureau. The written warning issued by Mr. Knowlton to Mr. Jelley on June 22, 2007 describes the appellant's "overall failure to supervise" and reprimands him for "unprofessional and uncooperative communications," "failing to properly implement Department safety programs and [the appellant's] failure to monitor and control workplace conduct within [his] bureau." The performance evaluation covering roughly the same period of time, which also was signed by Mr. Knowlton and delivered to the appellant after the issuance of the written warning, describes the appellant as meeting or exceeding expectations in all categories and all sub-categories, including "Communications," "Decision Making," "Cooperation" and "Management of Subordinates."

Between February 2005 and June 2007 when the warning was issued, both the Director of Operations and the Director of Administration were aware of deteriorating relations within the welding shop. Although the Personnel Rules impose no requirement for an agency to provide counseling prior to the issuance of a written warning, common sense and good management practice would certainly suggest that an agency would act swiftly to prevent a situation from deteriorating farther rather than waiting two or more years to take formal disciplinary action. In this case, the only evidence that suggests some level of managerial involvement are those documents detailing attempts by the Administrator of the Bureau of Human Resources and the Department's Chief of Labor Compliance to provide guidance and technical assistance to the appellant. Neither of these employees, the Board noted, had supervisory authority over the appellant or any of the employees in Mechanical Services, nor did they have any authority to direct, counsel or discipline the appellant and his subordinate managers as the problems escalated.

The written warning also includes allegations that the appellant falsified records received, maintained or utilized by the agency when he issued a written warning to a subordinate allegedly without first ensuring that the facts outlined in the warning were accurate. Although that employee never appealed the warning, he later complained that the appellant had fabricated evidence to support the warning, and that the appellant had issued the warning in retaliation for complaints the employee had made about the appellant. The employee's allegations were investigated, and a report issued to DOT management in late 2006.

The appellant claimed that he had not misrepresented the facts outlined in the warning, but that Bonnie Berry, the actual author of the written warning, must have misunderstood his description of events. The appellant claimed that when he signed the written warning, he did so without giving particular attention to the contents. That claim prompted a further investigation, and the investigator issued a supplemental report on December 4, 2006, indicating, "Since there was no miscommunication between JELLEY and BERRY [the HR staff person who authored the written warning] on this issue, there was either a miscommunication between COTTON-MOORE-JELLEY [the appellant and his subordinate managers], or else JELLEY deliberately gave false information to BERRY for the letter of Warning." (State's 1, pa. 224)

The investigator's report certainly appears to support the allegation that the appellant either fabricated evidence or ignored the facts when he issued the written warning to his subordinate. As serious a charge as this is, the Board again can not overlook the fact that the investigation into the charge was completed and a report submitted on December 4, 2006. The appellant's performance evaluation covered the period of March 9, 2005 through January 9, 2007 but made no mention of the results of that investigation.

The written warning was issued to the appellant on June 22, 2007 and signed by Operations Director Lyle Knowlton. The performance evaluation for the 21 months between March 5, 2005 and January 9, 2007 was signed by the appellant and Mr. Knowlton on September 13, 2007. The State failed to offer any reasonable explanation why a letter of warning should be upheld when it is directly contradicted by the employee's performance evaluation for roughly the same period of time.

Decision and Order

The Board generally is reluctant to overturn a written warning when there is reasonable evidence to support its issuance. In this case, however, the Board can not ignore the principles of fundamental fairness when presented with the extraordinary inconsistency between the substance of the appellant's warning and the contents of his performance evaluation. The Board also can not overlook the agency's failure to take timely or appropriate steps to resolve problems in the appellant's bureau when they were first discovered. For all the reasons set forth above, the Board voted unanimously to GRANT the appeal and order the written warning removed from Mr. Jelley's file. In so doing, however, the Board directs the department to insert a counseling memo into the appellant's personnel file, outlining specific corrective action that the appellant is expected to take in order to avoid disciplinary action.

THE PERSONNEL APPEALS BOARD

/s/

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Philip Bonafide, Acting Chair

/s/

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Robert Johnson, Commissioner

/s/

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Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301  
Nicholas McGinty, SEA Grievance Representative, 105 N. State St., Concord, NH 03302-3303  
Lynmarie Cusack, Senior Assistant Attorney General, Dept. of Justice, 33 Capitol St., Concord, NH 03301  
Frances Buczynski, Human Resources Administrator, Dept. of Transportation, 7 Hazen Dr., Concord, NH  
03301