

# State of New Hampshire



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

**Appeal of Jill C. Rockey**

**Docket #2011-D-018**

**Department of Safety, Division of State Police**

September 7, 2011

By letter dated August 23, 2011, Attorney Marta Modigliani filed with the Board the Department of Safety/Division of State Police Motion to Dismiss for Lack of Subject Matter Jurisdiction in the above-titled appeal. The Appellant's Objection to that motion was received by the Board on September 2, 2011.

For the reasons set forth below, and for those included in the Department's Motion, the Board voted unanimously to dismiss the appeal as a matter outside the Board's subject matter jurisdiction.

1. RSA 21-I:46, I, describes the Personnel Appeals Board's jurisdiction as follows:

"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.

(b) The refusal of an appointing authority to grant a leave of absence without pay.

(c) Classification decisions of the director of personnel when the reasons for appeal are based on any of the following:

(1) The personal qualifications of an employee exceed the minimum requirements for the position in question.

(2) The employee has held the position for a long period of time.

(3) Any positions previously held by the employee or any examinations passed by the employee which are not required for the position in question.

(4) The employee has reached the maximum of the assigned salary grade.

- (5) The cost of living or related economic factors.
2. RSA 21-I:57 concerns appeals by employees and/or department heads involving the allocation of a position in the classification system, while RSA 21-I:58 addresses appeals by "[a]ny permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57."
  3. The instant appeal concerns a "Unit Level Counseling" memo issued to the Appellant by Captain David G. Parenteau for allegedly issuing an unauthorized "no contact order," instructing one trooper not to contact another trooper. The Appellant disputes the allegation, asserting that she issued no order, but only made a recommendation for no contact.
  4. Per 1501.03 (a)(4) authorizes an appointing authority to place in an employee's personnel file, "Performance evaluation forms and related counseling letters." (Emphasis added.) Per 1501.03 (a)(6), permits "Rebuttals by the employee concerning: a. Performance evaluations and counseling letters; and b. Disciplinary actions" to be placed in the employees as well. Per 1501.03 (a) clearly differentiates between counseling and discipline.
  5. The term "counseling" appears only twice in the Personnel Rules, and in each instance the term is related to performance evaluations which are specifically exempt from appeal under the provisions of RSA 21-I:46, I, a.
  6. Although the term "written warning" does not appear in the definitions section of the personnel rules, it is, in fact, defined by Per 1002.04 (a) as "the least severe form of discipline," with all its component parts described by Per 1002.04 (c) (1)-(5).
  7. Contrary to the Appellant's position as set forth in paragraph 12 of the Objection, unsatisfactory performance evaluations are not "undisputedly discipline."
  8. Neither the Personnel Rules nor the law identify unsatisfactory performance evaluations as recognized forms of discipline. RSA 21-I:46, I (a) states specifically, "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."
  9. The memo itself does not include the required elements for it to be considered a form of discipline, nor does it suggest that disciplinary action will be taken as a result of events described in the memo. The memo instead affirms a work expectation. Specifically, Captain Parenteau wrote, "I expect you to be cognizant of the ramifications of such decisions and more importantly, not undermine the process of this investigation. In the future, you will be expected to foster and maintain open communications with your supervisors and work collectively with the Division." [May 10, 2011 counseling memo, page 2]

As the Board found in the Appeal of Dorothy Chicaderis (Docket #2007-D-007, January 23, 2008), "The Appellant is not without recourse. The appellant already enjoys the protection of RSA 275 :56, II, which provides, in pertinent part, 'If, upon inspection of his personnel file, an employee disagrees with any of the information contained in such file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his version of the information together with evidence supporting such version . Such statement shall be maintained as part of the employee's personnel file and shall be included in any transmittal of the file to a third party and shall be included in any disclosure of the contested information made to a third party.'"

For all the reasons set forth above, the Board found that the memo of counsel issued to the Appellant was not a written warning as described by Per 1002.04 of the Rules of the Division of Personnel. It was, instead, a form of counseling consistent with ongoing evaluation of an employee's work performance, exempt from appeal under the provisions of RSA 21-I:46. Accordingly, the Board voted unanimously to DISMISS the appeal as a matter outside the Board's subject matter jurisdiction as defined by RSA 21-I:46, 57 and 58.

FOR THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
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Patrick Wood, Chair

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