

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF KEVIN D. YOUNG

Docket #97-D-8

Department of Agriculture

June 11, 1997

The New Hampshire Personnel Appeals Board (Miller, Bennett and Johnson) met on Wednesday, March 5, 1997, under the authority of RSA 21-I:58, to hear the appeal of Kevin D. Young, an employee of the Department of Agriculture. Mr. Young, an Inspector assigned to the Bureau of Weights and Measures, was appealing a December 2, 1996, letter of warning for allegedly abusing his authority as Weights and Measures Inspector. SEA Field Representative Jean Chellis appeared on behalf of the appellant. Agriculture Commissioner Stephen Taylor appeared on behalf of the State. The appeal was made on offers of proof by the representatives of the parties. The record in this matter consists of the audio tape recording of the hearing, documents submitted by the parties prior to the hearing, documents admitted into evidence at the hearing, and any notices and orders issued by the Board.

Commissioner Taylor alleged that Mr. Young used his position as an inspector to punish a private citizen when that individual chose to exercise his rights to appeal an administrative fine which Mr. Young intended to impose. He argued that upon notification of the individual's desire to appeal the fine, Mr. Young failed to set up a hearing on the administrative fine and then initiated a criminal complaint against the individual as a form of reprisal. Commissioner Taylor argued that Mr. Young also failed to establish a hearing date on the administrative complaint, Mr. Young further violated the individual's rights to pursue a proper settlement of his dispute.

Mr. Chellis argued that Mr. Young had not retaliated, but had simply taken the steps he was entitled to take in his capacity as an inspector and prosecutor by initiating a criminal complaint when the defendant failed to comply with the terms and conditions of a plea bargain involving the administrative fine. She argued that Commissioner Taylor dismissed the administrative complaint issued by Mr. Young, thereby eliminating the need for Mr. Young to set up a hearing for the individual making the complaint. Finally, she argued that after the complaint against Mr. Young, Commissioner Taylor has prohibited Mr. Young from fulfilling his responsibilities as a Weights and Measures Inspector. She argued that the warning should be removed from Mr. Young's file, and Commissioner Taylor should be directed to remove the restrictions on Mr. Young's fulfillment of the responsibilities of his position.

The evidence reflects that on August 30, 1996, Mr. Young began investigating a complaint by Charlotte Yeaw that the two cords of wood she had purchased from Tree Hugger Farms was heavy, wet, dirty and nothing but "junk." Mr. Young reported that after interviewing Ms. Yeaw and measuring the cordwood which had been delivered, he went to Tree Hugger Farms where he spoke with Greg Clark. He indicated that Mr. Clark remembered making the sale and hearing Ms. Yeaw's complaint, however, he did not respond to the complaint because Mrs. Yeaw had "an attitude" and was "aggressive." Mr. Young reported that he told Mr. Clark he was in violation of selling less than a cord of wood, that a complaint would be written for the violation, that he could write a criminal complaint or an administrative complaint, and that he would give Clark the option of whether to pay the administrative fine of \$250 or defend himself against a criminal complaint where Mr. Young would recommend a fine ranging from \$500 to \$1500. He also reported that when he was "negotiating" with Mr. Clark and explaining why the fines were so high, he said he would tell the judge that Mr. Clark sells roughly 500 cords of wood a year, each of which had been short because of the size of his truck. He said the judge would take that information into consideration when setting a fine for the criminal offense. He reported that he told Mr. Clark he could either agree to pay the administrative fine or he could appeal the complaint and the appellant would write a criminal complaint which would be heard in Keene District Court. He reported that Mr. Clark then

simply pay the fine. He wrote that he agreed to return in approximately one week to issue the complaint.

Mr. Young reported that instead of issuing the complaint in hand, he elected to send the complaint by certified mail. He said he told Mr. Clark that the fine had to be paid by October 14, 1996, and that he simply needed to check off the box on the complaint form which said he accepted the fine, and return his signed, dated complaint, with a check for the fine, by October 14th.

Mr. Young reported that he followed up with Mr. Clark on October 29, 1996. Mr. Young reported that Mr. Clark told him he had raised the sides of his truck so that he was now delivering more than a cord of wood, and that he disagreed he had been selling short cords before that. Mr. Clark had sent a check for the shortage to Mrs. Yeaw, however, he said he had not sent in the check for the fine, because he had called Mr. Young's "boss" and was advised that if he felt the fine was too high, he should appeal it. Mr. Young then wrote a criminal complaint against Mr. Clark to be heard in Keene District Court. He also told Mr. Clark that his invoice was out of compliance, but that if he corrected it, he would not write a complaint for the invoice violation.

In defense of his appeal, Mr. Young argued that writing the criminal complaint was within his authority as a prosecutor. He argued that Commissioner Taylor had conferred upon him broad latitude in determining how his complaints should be handled, including the discretion to determine when it would be appropriate to initiate an administrative and/or a criminal complaint. He also referred the Board to a letter which he had solicited from Michael Johnson, Merrimack County Attorney, wherein Mr. Johnson said that on the facts as Mr. Young had related them, it appeared that the appellant had acted within his discretion. Mr. Johnson wrote:

“When a prosecutor and a defendant engage in plea discussions which result in an agreement to dispose of a criminal charge in a less serious manner, that agreement is binding upon the state. However, when the defendant withdraws from the agreement by conduct or declaration, the state is free to pursue any lawful remedy

which was available to it prior to the plea agreement. The prosecutor is not acting with vindictiveness merely by instituting a criminal prosecution after an agreement for a lesser administrative penalty has failed.”

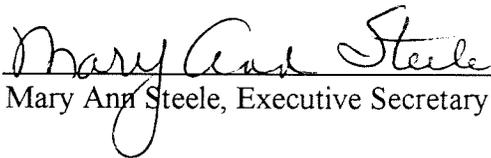
Commissioner Taylor argued that Mr. Young’s decision to issue a criminal complaint against Mr. Clark after Mr. Clark elected to appeal the administrative fine was simply an act of retaliation. He asserted that every citizen subject to the rules and regulations of the Department of Agriculture is also entitled to appeal those decisions issued under their regulations, and should be entitled to do so without fear of reprisal. Commissioner Taylor argued that once he had been issued the administrative complaint, Mr. Clark had every reason to believe he could appeal the fine associated with the complaint without having to worry that he would then be prosecuted on a criminal complaint as well. He argued that after learning that Mr. Clark intended to appeal the administrative fine, Mr. Young failed to take steps to set up an administrative hearing, issued the criminal complaint, and threatened a further complaint for violation of hearing, thus further abusing his authority as an Inspector assigned to Weights and Measures.

Commissioner Taylor argued that the Clark incident was indicative of the appellant’s conduct in the field. He argued that many complaints never really come to light because individuals are afraid of reprisal. Commissioner Taylor argued that after investigating the incident, he determined that there was hard evidence that Mr. Young had abused his discretion and acted out of personal animosity because Mr. Clark had dared to challenge his authority. He argued that Mr. Young’s actions were an embarrassment to the Department and the State of New Hampshire and could not be permitted to work in the field independently. He said that regardless of the outcome of Mr. Young’s appeal, he could only permit Mr. Young to work with close supervision and could no longer permit the appellant to work independently in the field.

On the evidence and offers of proof, the Board voted to order the removal of Mr. Young’s written warning, finding he had not committed an offense warranting discipline under the “Optional Dismissal” provisions of the Rules of the Division of Personnel. Commissioner Taylor may be

correct in his assessment that Mr. Young's issuance of a criminal complaint was driven largely by his displeasure at Mr. Clark's decision to appeal the administrative fine. However, there was insufficient evidence to persuade the Board that the act of issuing a criminal complaint was beyond the scope of authority conferred upon him by Commissioner Taylor to prosecute cases, administratively and/or criminally. However, the Board also found that the Commissioner has sole discretion in determining whether or not to allow Mr. Young to act independently as a prosecutor. If the Commissioner believes that his agency is best served by more closely monitoring Mr. Young's assignments and activities, he is fully within his authority to do so.

FOR THE PERSONNEL APPEALS BOARD


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