

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Mark Jordan - Docket #2011-D-017

New Hampshire Department of Corrections

May 9, 2012

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, April 18, 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 Mark Jordan, an employee of the NH Department of Corrections. The Appellant, who was represented at the hearing by Attorney Kevin Buck, was appealing his five-day disciplinary suspension without pay as a result of an altercation between the Appellant and another Department of Corrections employee that occurred on March 10, 2010, in the parking lot of the Men's Prison in Concord,. Senior Assistant Attorney General Lynmarie Cusack appeared on behalf of the State.

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

State's Exhibit 1 (numbered pages 1-13)

- June 7, 2011, notice of disciplinary suspension (pages 1-2)
- June 7, 2011, request to return to work and produce documents for award of back-pay (page 3)
- May 24, 2011, request from Commissioner Wrenn to meet with Mark Jordan to allow Jordan to refute the findings of an investigative report prior to possible imposition of discipline (page 4)
- February 25, 2011 "Review of the transcript" of Concord District Court Case No. 10-CR-4198 (pages 5-8)
- Court Decision (pages 9-13)

The following persons gave sworn testimony:

William L. Wrenn, Commissioner, Department of Corrections

Mark Jordan, Corrections Officer, NH Department of Corrections¹

After some discussion, the Board agreed to hold open the record of the hearing until Friday, April 20, 2012, to allow the parties to submit a partial transcript of the Appellant's criminal trial in Concord District Court for case number 10-CR-4198 (State of New Hampshire v. Mark Jordan) on the single complaint alleging a Class A misdemeanor, simple assault. Commissioner Wrenn testified that he had not reviewed the testimony of three of the witnesses before reaching his decision to suspend the Appellant. Therefore, the Board agreed to accept the transcript with the testimony of those three witnesses redacted.

The Board did not take into consideration any information related to the investigative suspension that Commissioner Wrenn ordered prior to the disciplinary suspension, while a criminal investigation and criminal charges against the Appellant were pending. The Board restricted its consideration to the Appellant's conduct during the March 10, 2010, altercation and the five-day disciplinary suspension ordered by Commissioner Wrenn as a result.

The Board also took notice of the "not guilty" verdict handed down by Judge Boyle in the criminal case. However, the Board notes that a "not guilty" verdict in a criminal proceeding means only that the State has failed to prove, beyond a reasonable doubt, the elements of the offense as charged. In an administrative proceeding, the State has the burden of producing evidence supporting the action under appeal. The Appellant has the burden of proving, by a preponderance of the evidence, that the action under appeal was unlawful; the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or the disciplinary action was unjust in light of the facts in evidence.

After carefully considering the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law:

¹ The attorneys representing the parties did not engage in either direct examination or cross-examination of the Appellant. The Appellant made himself available to answer questions by any members of the Board.

Findings of Fact

1. On March 10, 2010, the Appellant was working as a Corrections Officer assigned to the first shift in the infirmary at the NH State Prison for Men. After the end of his shift, the Appellant left work and was standing in the parking lot at the Men's Prison talking with several of his co-workers when he saw a Corrections Sergeant exiting the building and heading toward the Sergeant's vehicle in the parking lot. The Sergeant and the Appellant were angry with one another about an incident that had occurred earlier in the day
2. The Appellant initiated contact with the Sergeant by calling out to the Sergeant and asking if the Sergeant was going to start yelling at the Appellant again. The Appellant's question sparked a round of verbal sparring between the two, including taunts back and forth such as "why don't you come over here?" along with an exchange of profanity. Both officers were in uniform at the time that the incident began, and both were in full view of Department of Corrections employees and anyone in the vicinity who had a view of the prison parking lot.
3. The altercation escalated when the Sergeant began moving toward the Appellant and ultimately made physical contact with the Appellant in what was described by at least one witness in the criminal trial as a "belly bump," and by another as the Sergeant "head-butting" the Appellant with his nose. The Appellant, who testified at trial that he felt the Sergeant was going to head-butt him again, said that he acted in self-defense when he struck the Sergeant.
4. The Appellant and the Sergeant were physically separated by other officers who were present at the time of the incident. The Sergeant then threatened to bring charges against the Appellant, and proceeded to the Warden's office to report that he had been assaulted by the Appellant. After hearing the Sergeant's report, Warden Gerry arranged for Investigator Andrew Newcomb to talk with the Sergeant and take his statement.
5. The Appellant also attempted to see Warden Gerry to report that he had been assaulted by the Sergeant, but instead the Appellant was met in the hallway by the Major. The Appellant reported to the Major that he had been assaulted by the Sergeant, and he offered to follow the Major to the Investigations Office so that he could make a statement. Instead, the Major had the Appellant wait in the hallway, and he sent Investigator Newcomb to see the Appellant. Investigator Newcomb did not conduct a formal interview, but instructed the Appellant to go home and told the Appellant that he could submit a statement in writing.
6. After receiving notice from the Men's Prison that the Appellant allegedly had assaulted the Sergeant in the parking lot at the Men's Prison, Commissioner William Wrenn made a

request for the NH State Police to conduct an investigation of alleged criminal conduct. Commissioner Wrenn ordered the Appellant to be suspended pending the outcome of the criminal investigation. In order to avoid a conflict by conducting an internal investigation while the criminal investigation was pending, the Warden did not initiate a formal internal investigation of the Appellant's conduct, or of his complaint against the Sergeant.

7. At the conclusion of the criminal investigation, which was conducted by Stephen Puckett of the NH State Police Major Crimes Unit, the Appellant was charged with simple assault. The Appellant was tried in Concord District Court on February 25, 2011. Judge Gerald Boyle heard the case, and after approximately a day of testimony, Judge Boyle found the Appellant not guilty on the charge of simple assault.
8. After receiving notice of the Appellant's not-guilty verdict, Commissioner Wrenn directed Colin Forbes to conduct an administrative review of the trial transcripts and provide a report for the Commissioner's use in determining what administrative action would be appropriate. Commissioner Wrenn consulted the department's Human Resources Administrator regarding the Appellant's employment record so that he might take length of service and any record of discipline into consideration for any possible administrative action. Commissioner Wrenn also considered Judge Boyle's comments concerning the incident and the conduct of all Department of Corrections personnel who were involved in the incident, or who witnessed the incident.
9. By memo dated May 24, 2011, Commissioner Wrenn forwarded a copy of Director Forbes' "summary report on the Court Transcripts regarding an altercation on the NH State Prison-Men grounds on March 10, 2010." In that memo, Commissioner Wrenn also invited the Appellant to attend a meeting with the Commissioner on June 1, 2011, at which time the Appellant would be permitted an opportunity to refute any findings in the report or present evidence that he believed the Commissioner should consider before reaching any decision about possible disciplinary action.
10. At their meeting on June 1, 2011, the Appellant reminded the Commissioner that the Court had found the Appellant "not guilty" on the charge of simple assault. The Appellant also asserted that the Sergeant was the actual aggressor during the March 10, 2010, altercation, and the Appellant told the Commissioner that he acted in self-defense when he struck the Sergeant.
11. After hearing the Appellant's arguments, evaluating information in Director Forbes' report, reviewing portions of the trial transcript, evaluating the testimony of various witnesses to the altercation, and considering the Appellant's length of service and the absence of any formal

discipline in the Appellant's record, Commissioner Wrenn determined that the Appellant was the one who instigated the confrontation with the Sergeant.

12. On June 7, 2011, Commissioner Wrenn notified the Appellant that he was to be suspended without pay for a period of five working days as a result of several rules violations, as well as conduct that was, "unprofessional, disgraceful, unacceptable, and inexcusable." The Sergeant who was involved in the altercation with the Appellant on March 10, 2010, received more severe discipline than that administered to the Appellant as a result of his conduct during the March 10, 2010, incident.

Rulings of Law

- A. By initiating a verbal confrontation with a Corrections Sergeant on the afternoon of March 10, 2010, and striking that officer, the Appellant engaged in conduct that constituted, "failure to meet work standards or other conduct for which a written warning may be issued," but which warranted the imposition of discipline more severe than a written warning, as described by Per 1002.06 (a)(1) of the NH Code of Administrative Rules.
- B. By shouting, taunting and using profanity in a verbal exchange with another officer, the Appellant violated Department of Corrections policies and procedures, which require employees to, "conduct themselves at all times with mutual kindness and respect." As a result, the Appellant's conduct constituted a violation of Per 1002.06 (a)(2) of the NH Code of Administrative Rules.
- C. By engaging in a physical altercation with another Department of Corrections staff member, the Appellant committed the offense of "fighting or attempting to injure another employee or individual served by the agency," as prohibited by Per 1002.06 (a)(2)c.

Decision and Order

In his notice of appeal, the Appellant argued that, "there is no proper, lawful basis to conclude that Jordan failed to act appropriately, reasonably and properly at all relevant times during the incident on March 10, 2010..." The Board does not agree. Simply put, there is no evidence to suggest that the incident on March 10, 2010, would have occurred at all if the Appellant had not made a point of calling out to the Sergeant as he was leaving work, taunting the Sergeant, and instigating a confrontation in the first place.

As Judge Boyle noted in his decision:

“I think that the conduct out in the parking lot was disgraceful and unacceptable. Any type of yelling and screaming back and forth among inmates would cause those inmates to have an incident report and maybe get them set back. Any type of a physical altercation among inmates would cause those inmates definitely to be set back. That kind of conduct, obviously, cannot happen with corrections officers. We cannot have corrections officers that are labeled hotheads, short-fused, and the other adjectives that I heard to describe people in this room today. We expect our correction officers to be cool, calm, and collected because the environment that they are in mandates that they be such because they are constantly being subjected to adverse catcalls, behavior problems, and so forth. There is no excuse for a physical altercation among corrections officers.”

The transcript reflects that Judge Boyle was referring to both the Appellant and the Sergeant, as well as a more senior officer who witnessed the confrontation as it was unfolding, but who did nothing to intervene. The Judge's analysis of the incident and the responsibility of each of the parties involved accurately describes the reason why discipline more serious than a written warning was warranted in this case, and also explains why the Board did not find the Appellant's actions during the incident to be appropriate, reasonable or proper, as the Appellant suggests.

The Appellant argued that discipline was inappropriate under the circumstances because the Appellant was a long-term employee with a record free of any formal discipline. While length of service and performance history might be mitigating factors when determining the level of discipline for substandard performance, the Board found that the seriousness of the offense, in this instance, far outweighs either of those factors.

The Appellant argued that he acted in self-defense, and therefore acted reasonably and appropriately under the circumstances. Again, the Board does not agree. According to the Appellant's testimony at trial, the Sergeant was known for his “short fuse.” The Appellant also was very much aware of the animosity that had developed between himself and the Sergeant, particularly after their confrontations earlier that day. The Appellant made a conscious decision to engage the Sergeant in a confrontational manner. Once the Appellant realized that the Sergeant had “risen to the bait,” the Appellant continued to shout and swear at the Sergeant

and finally did nothing to avoid the physical altercation that ensued. For the person who actually picks a fight, it is difficult to rely on "self-defense" as an excuse for his own misconduct.

Finally, the Appellant argued that discipline was inappropriate because he had been found not guilty of simple assault. The Board does not agree.

As Commissioner Wrenn testified, in a criminal trial, the State must prove beyond a reasonable doubt that the alleged crime occurred. If there is insufficient evidence to support the charge, and the court enters a verdict of not guilty, it does not mean that the incident itself never occurred. Someone might not be found guilty of a crime, but still be found to be in violation of administrative policies and procedures as a result of the same incident.

As Judge Boyle stated in his decision:

"At the end of the State's case, I thought there would be a guilty finding here today for a violation-level offense of simple assault by mutual combat, but at the end of the trial, after having heard the defense's case, I'm going to enter a finding of not guilty, period. Now, I am doing so because I don't believe the State has proven beyond a reasonable doubt the elements of the offense that they must prove. I have to tell you that I am very concerned about the evidence that I heard here today. I am concerned about the kind of conduct that went on inside the prison through telephone conversations, through meetings, and I'm concerned about the conduct that went on out in that parking lot...

"I am very disappointed as to the conduct of the corrections officers in this case, but my disappointment and my finding the conduct out in that parking lot to be disgraceful and unacceptable does not rise to the level of my finding somebody guilty beyond a reasonable doubt of a criminal offense. That's why I'm entering a finding of not guilty."

On all the evidence and argument presented by the parties, the Board found that the Appellant failed to prove, by a preponderance of the evidence, that the Commissioner's decision to suspend the Appellant without pay for a period of five days was unlawful, that it violated the rules of the division of personnel, that it was unwarranted by the alleged

conduct or failure to meet the work standard in light of the facts in evidence, or that it was unjust in light of the facts in evidence.

The Board voted unanimously to DENY the appeal, finding that the decision to suspend the Appellant was lawful, reasonable, and just in light of all the facts in evidence.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



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Robert Johnson, Commissioner



Joseph Casey, Commissioner

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