

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *Appeal of Donald McCabe*

*Department of Safety, Division of State Police*

*Docket #2006-D-002*

*January 31, 2007*

A quorum of the New Hampshire Personnel Appeals Board (Wood and Casey) met in public session on Wednesday, January 24, 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 Donald McCabe, an employee of the Department of Safety, Division of State Police. Trooper McCabe, who was represented at the hearing by Attorney James Donchess, was appealing a five-day suspension without pay effective August 17, 2005 for off-duty conduct that allegedly violated the Division's Professional Standards of Conduct.<sup>1</sup> Attorney Marta Modigliani appeared on behalf of the Division of State Police. Neither party objected to the members of the Board convened to hear the appeal.

Before hearing the parties on the merits of the appeal, the Chair reminded the parties that the Board's records, including its decisions, are public records. In light of the underlying facts, the Board wanted to make sure the Appellant understood that the records were not in any way protected. The Appellant, through his counsel, indicated that he understood.

The record of the hearing in this matter consists of notices issued by the Board, pleadings submitted by the parties, the audiotape recording of the hearing on the merits of the appeal, a "Joint Stipulations and Agreements of the Parties," and documents offered into evidence by the State and admitted into the record without objection as follows:

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<sup>1</sup>The Board had scheduled a mandatory prehearing conference for Wednesday, November 2, 2005. The prehearing conference was postponed at the Appellant's request and rescheduled as the parties' and the Board's schedule permitted.

- Exhibit 1: Internal Investigation Report by Capt. Hambrook
- Exhibit 2: Supplemental Report to Investigation Report
- Exhibit 4: Notice of Intent to Suspend without Pay from Colonel Booth
- Exhibit 6: Professional Standards of Conduct Rules 1.11.0
- Exhibit 7: Trooper McCabe's Supplemental Job Description

The Appellant objected to proposed Exhibit 3, identified as "Memorialization of January '05 Counseling by Capt. Hambrook regarding Personal Conduct by Tr. McCabe." The Board sustained the objection and excluded that exhibit from the record, as it involved informal counseling that was not directly related to the particular incident and events giving rise to the Appellant's suspension. After a preliminary review of Exhibit 5, identified as "Letter of Warning/Suspension," the Board found that the incident described in Exhibit 5 occurred after the date of the suspension without pay currently under appeal. Accordingly, the Board decided to exclude that exhibit from the record as well.

At the hearing on the merits of the appeal, the following persons gave sworn testimony:

- Michael Hambrook, State Police Captain
- Frederick H. Booth, Colonel, NH State Police
- Donald McCabe, Jr., Appellant

After carefully reviewing the documentary evidence and witnesses' testimony, the Board found that there were no material facts in dispute.

1. The Appellant has worked as a Trooper for the Division of State Police since 1997, and is currently assigned to Troop A.
2. Trooper McCabe was arrested by the Rochester Police Department on the evening of February 10, 2005 while he was off-duty following an incident at the YMCA Ice Arena involving the Appellant's estranged wife.

3. Officers from the Rochester Police Department had been dispatched to the arena for a reported "Domestic Disturbance," and after speaking with Trooper McCabe's estranged wife and Ms. McCabe's stepfather, police questioned Trooper McCabe about contact he may have had with Ms. McCabe.
4. Trooper McCabe denied having any contact with his wife and also denied calling his wife by a graphic, sexually demeaning name, threatening her, or even speaking with her. He told officers that his estranged wife was simply trying to create trouble for him on the job.
5. Trooper McCabe was arrested for criminal threatening, and was transported to the Rochester Police Department where he was booked, and later released on bail.
6. Ms. McCabe obtained temporary protective orders, and although Trooper McCabe ultimately was found not guilty on the charge of criminal threatening, because of the nature of the charges, Trooper McCabe's weapons were confiscated.
7. Within four days of Trooper McCabe's arrest, the Division of State Police undertook its own internal investigation, separate from the criminal proceedings, to determine whether or not Trooper McCabe's conduct violated the Division's Professional Standards of Conduct. Lieutenant (now Captain) Michael Hambrook conducted the investigation.
8. Lieutenant Hambrook's findings, transmitted in a report to Colonel Booth on March 23, 2005 [State's Exhibit 1] include the following:
  - a. "What is clear is that Trooper McCabe was asked on several occasions if he had an altercation with his wife and on several occasions he lied to the police and said he did not even talk to her. Trooper McCabe admitted to me during my interview with him that he lied to the police about what he had said to his wife. Trooper McCabe said that he was embarrassed about what he had said to his wife and thought the conversation was private. He told me that he did not make a calculated lie but was caught off guard, and, in an attempt to keep an embarrassing statement private, he just denied it. Unfortunately, once he told the lie it compounded itself and he

was forced to retell the lie to several officers at several different times during the investigation." [Exhibit 1, page 14]

- b. Lieutenant Hambrook concluded that "...both criminal charges in this case are based on flimsy evidence and have little hope of sustaining a conviction." [Exhibit 1, page 14]
9. Lieutenant Hambrook determined that Trooper McCabe's conduct violated Section 1.11.0, subsection 1.11.2, Personal Behavior, in that his admitted-to conduct during the February 10, 2005 incident and his admission that he lied to police personnel during the initial investigation of that incident constituted a violation, compromising Trooper McCabe's professionalism and bringing discredit upon himself and the Division of State Police.
10. Instead of suspending the Appellant without pay under the provisions of (former) Per 1001.05 (3) pending the resolution of the criminal charges, Colonel Booth chose to assign Trooper McCabe to work in a civilian capacity in the department's dispatch center.
11. Although Trooper McCabe was not allowed to carry a weapon or engage in law enforcement activities until the pending criminal charges were resolved, the Division of State Police continued to pay Trooper McCabe as a trooper at his regular rate of pay, provided him with an unmarked vehicle to commute to and from the dispatch center in Concord to work, and paid him for travel time from his home to headquarters.
12. The Appellant appeared in Rochester District Court on June 3, 2005 for trial on the charge of criminal threatening. Judge Cullen handed down his verdict on June 30, 2005, finding the Appellant not guilty of the charge.
13. Trooper McCabe faxed a copy of the verdict to Lieutenant Hambrook on July 7, 2005.
14. Colonel Booth and members of his staff met with the Appellant and his union representative on August 17, 2005 in a predisciplinary meeting to review the evidence supporting the Colonel's decision to suspend the Appellant without pay for five days for conduct the Appellant displayed during the February 10, 2005

incident, and as a result of the Appellant lying to Rochester police during their preliminary investigation of that incident.

Position of the parties:

Colonel Booth testified that employees in law enforcement must be held to a higher standard because of the authority they exercise. He testified that as the result of an earlier incident, Lieutenant Hambrook had counseled the Appellant about avoiding any possible confrontations with Ms. McCabe, and that the Appellant demonstrated extremely poor judgment by ignoring that advice and initiating a confrontation with Ms. McCabe on the night of February 10, 2005. Colonel Booth testified that although the Appellant characterized his behavior as private conduct, the Division's Standards require Division members to conduct themselves in a manner that will reflect credit on themselves and the Division of State Police, regardless of the employee's duty status. Colonel Booth testified that the Appellant's private conduct became a public matter when Rochester Police became involved, and that the Appellant violated the Division's standards by lying to the Rochester Police. Colonel Booth testified that he believed the entire matter would have been handled very differently by the Rochester Police Department if, on the night of the incident, the Appellant had simply told the truth.

Trooper McCabe testified that he and his estranged wife were in the midst of a very difficult divorce when the incident occurred in February, 2005. He testified that on the night in question, he had not seen his daughter, a minor, since Christmas, and that his son, also a minor, was not speaking to him. He testified that he was extremely upset, and when he saw his wife waiting outside the ice arena in her van, he walked up to talk to her. Trooper McCabe testified that his wife "gave [him] a look that said, what right do you think you have coming up to my van." He admitted he was angry, and said to her, "Has anybody called you a c\_\_\_ today, because you are." He testified that he made a gesture as if he was talking on the phone and told her, "Why don't you call Billy and tell him," referring to Ms. McCabe's attorney. He then entered the ice arena. Trooper McCabe testified that Ms. McCabe went into the arena and told their son what Trooper McCabe

had said before returning to her van. Trooper McCabe testified that when he later left the arena, he saw Ms. McCabe's stepfather's truck parked near her van along with a Rochester Police Department cruiser. Trooper McCabe testified that he proceeded to his own vehicle, assuming that if the police were there to talk to him, they would tell him. Trooper McCabe said the officer then flagged him down with a light. When officers questioned Trooper McCabe about an incident with Ms. McCabe, he denied that anything had occurred. Trooper McCabe denied calling Ms. McCabe an obscene name, and volunteered that he had not even spoken with Ms. McCabe. He told the officers that Ms. McCabe was just trying to cause trouble for him in his job. Trooper McCabe was detained, then arrested and taken to the Rochester Police Department for booking.

Trooper McCabe testified that when police questioned him, he was too embarrassed to admit what he'd done. He characterized his behavior as "a quick lapse of judgment." Trooper McCabe testified that since the night of the incident, he had been truthful with everyone about what actually occurred that evening, and he believed that suspending him for five days was too severe a discipline. Trooper McCabe told the Board, "I basically said a total of 15 to 20 words to the Rochester Police. The suspension works out to an \$1100 to \$1200 fine."

### Rulings of Law

- A. (Former) Per 1001.05 (a) of the Rules of the Division of Personnel authorizes an appointing authority to suspend an employee without pay for a period of up to 20 days for (1) "Failure to meet any work standard."
- B. State Police personnel are subject to both the Rules of the Division of Personnel and the Division's own Professional Standards of Conduct.
- C. Sub-section 1.11.2 of the State Police Professional Standards of Conduct requires that, "Each Division Member shall, while on or off duty, conduct themselves in a manner that will reflect credit on themselves and the Division of State Police. No employee shall engage in conduct that tends to bring the Division into disrepute or reflects discredit upon the employee as a member of the

Division or which tends to impair the operation or efficiency of the Division or the employee."

- D. In accordance with Per-A 207.12 (b), in order to prevail on appeal of a disciplinary suspension without warning, an Appellant must demonstrate 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 authorizes the Board, "...In all cases ...[to] 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 and Order

The evidence clearly reflects that Trooper McCabe's behavior on the evening of February 10, 2005 was inappropriate, unprofessional, and contrary to the standards established by the Division of State Police Professional Standards of Conduct. While Trooper McCabe might wish to characterize his behavior during the incident as "private" conduct, the fact remains that the incident occurred in a public place and it resulted in an official investigation by another law enforcement agency, during which Trooper McCabe lied to the investigating officers.

Attorney Donchess argued that when Trooper McCabe lied to police under these circumstances, it was rather like a husband lying to his wife by telling her he went to church instead of telling her he went to the bar. Trooper McCabe agreed. Not only does the Board disagree, the Board is disturbed that a veteran officer seems unable or unwilling to differentiate between the two. No matter how flimsy the criminal charges against Trooper McCabe might have been, Trooper McCabe had an obligation to tell the truth, and he chose not to. In the Board's opinion, the Appellant's conduct was more

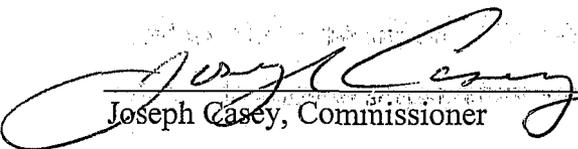
than a momentary lapse in judgment; it was a serious breach of department regulations sufficient to warrant substantial discipline.

While the Board sympathizes with anyone struggling through issues like divorce or child custody, it does not excuse the Appellant's conduct. Trooper McCabe made a conscious decision to initiate a hostile, insulting, intimidating exchange with his estranged wife. When given the opportunity to admit what he had done, he chose to lie instead. Behavior like that does reflect poorly on the Appellant as an individual, and as a member of the Division of State Police. In light of the facts in evidence, the Board found that Colonel Booth was justified in suspending the Appellant without pay. The Board also found that there were insufficient mitigating circumstances to warrant a reversal of the Colonel's decision, or any modification of the level of discipline imposed.

Having carefully considered the evidence and argument offered by the parties, the Board voted to DENY the appeal of Donald McCabe, Jr., upholding the Division of State Police's decision to suspend him without pay for a period of five days.

THE PERSONNEL APPEALS BOARD

  
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Patrick H. Wood, Chairman

  
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Joseph Casey, Commissioner

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