State of New Hampshire

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

Consolidated Appeals of:

German Sanchez (Docket #2004-D-018) and Thomas Roberts (Docket #2004-D-019)

New Hampshire Hospital

Decision on State's Motion for Reconsideration and Rehearing

Issued: April 23,2007

By letter dated June 30,2006, Attorney Raymond Perry filed the State's Motion for Reconsideration and Rehearing in the above-captioned appeal. To date, the Board has received no response or objection from the Appellants.

In accordance with Per-A 208.03 (b) of the NH Code'of Administrative Rules (Rules of the Personnel Appeals Board), a motion for reconsideration must "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The grounds raised by the State in support of its Motion are as follows:

> *"I. The PAB applied the wrong legal standard when it decided that the display of pornographic videotapes, magazines, andposters in the workplace did not violate the State of New Hampshire Policy on Sexual Harassment."*

In support of that argument, Attorney Perry wrote, "The PAB ruling stands for the proposition that state employees can view pornography,on state time in a state workplace, and cannot be subject to discipline. Such a result is unjust, unreasonable and unlawful." He also wrote, "The PAB has ignored the testimony of Marie Lang, Director of Human Resources and one of the investigators, that the material she encountered were grossly offensive.

The Board's decision repeatedly refers to the requirement for compliance with the Staters Sexual Harassment Policy, and describes the materials uncovered in the investigation as "adult" and "pornographic." The decision makes particular note that investigators, including Ms. Lang, found the materials offensive. Contrary to the State's assertion, the Board did not "…that the display of pornographic videotapes, magazines, and posters in the workplace did not violate the State of New Hampshire Policy on Sexual Harassment" [see Motion, page 1, section I], nor does the decision suggest or stand for the proposition that employees are free to engage in prohibited behavior without fear of repercussions. Instead, it stands for the proposition that each case must be weighed on its own merits, and that both mitigating factors and extenuating circumstances must be considered when considering the appropriate level of response once it is determined that a violation has occurred.

The State's Sexual Harassment Policy states, in part:

> "This policy is intended to promote a favorable work environment free from offensive behavior and intimidation detracting from employees' ability to perform their jobs. It identifies procedures to be followed in investigating and resolving complaints alleging specifically prohibited conduct, and emphasizes the education and training of state employees to further their compliance pursuant to these state and federal requirements."

It also provides the following:

> "…Should it be determined that a state employee has committed sexual harassment, immediate and appropriate corrective and/or disciplinary action shall be taken. This may include discharge and/or other forms of discipline under rules of the Division of Personnel."

The policy does not prescribe a particular level of discipline. Instead it refers to "immediate and appropriate corrective and/or disciplinary action." In this case, the Board considered a number of factors, including:

1. The length of time the offensive materials were present in the workplace without being noticed by safety or supervisory personnel;
2. The reaction of employees in the workplace;
3. The apparent lack of supervisory or managerial oversight; and
4. The investigators' own conclusion that "there is a disconnect between training and application" with respect to the policy itself.

Taking all those factors into consideration, the Board reasonably found that New Hampshire Hospital's decision to suspend the appellants without pay was simply unjust in light of the circumstances and in light of the facts in evidence.

"II. The finding that hone of the employees admitted to watching videotapes' (see Finding of Fact #3, Order Page 7) is unjust, unreasonable, and contrary to the weight of the evidence."

In support of that argument, Attorney Perry points out that Mr. Sanchez recanted during the hearing the statement he reportedly made to Sergeant Nolan and Deputy Chief Harris during their investigation. He further argues that the Board prohibited the State from impeaching Mr. Sanchez's credibility to refusing to admit into evidence documents pertaining to a 10-year old criminal conviction. Finally, he argues that Mr. Sanchez should not be considered credible because he testified at the hearing that he had never been disciplined when, in fact, he had previously received a written warning for misuse of State property.[1]

[1] The written warning to which the State refers was never offered into evidence.

Actually, the record reflects that throughout the informal settlement process, Mr. Sanchez took issue with the investigators' representation that he had admitted to watching pornographic films. According to Nolan and Harris, Mr. Sanchez admitted to watching 2-3 minutes of pornographic videos on 2 or 3 occasions over the course of a year. While the Board certainly does not condone the behavior if it occurred, the severity of the punishment far exceeded the extent of the alleged offense when considering the totality of the circumstances.

> *"III. The conduct of Mr. Roberts and Mr. Sanchez subjected the State to potential liability for a sexual harassment claim."*
>
> Mr. Perry argued that, "The standard for employer liability is whether the employer knew, or should have known, that sexual harassment existed and whether the employer took prompt, appropriate remedial action.... Knowledge by supervisors is inputed to the employer." [Motion, page 3, internal citations omitted.]
>
> Mr. Perry also argued that, "The Board's order suggests that the agency was somehow lax in its training of these employees... The Director of Human Resources testified about the training given to employees and supervisors. A comprehensive program is offered at the time of orientation, bolstered by annual refresher courses."

The Board understands the legal standard in evaluating claims of sexual harassment and imputed liability. In this case, however, the principle issue is "whether the employer took prompt, appropriate remedial action." Although the action that New Hampshire Hospital took in suspending these employees without pay for one and two weeks respectively may have been prompt, the Board did not consider it appropriate. As the Board noted in its order:

> "...[S]uspending employees who don't appear to understand the policy will do little to ensure compliance, particularly when management personnel has failed to visit the work area or provide regular and appropriate follow-up. The mere fact that the offensive materials had been in the workplace for more than a decade without personnel from

Safety or Security noticing suggests that the problem is as much an institutional problem as it is a matter for discipline. Rather than imposing formal discipline, particularly discipline as harsh as unpaid suspensions, New Hampshire Hospital should have removed the offensive materials and immediately undertaken remedial training for all personnel in Maintenance, Engineering and Grounds to ensure that all employees understood their responsibility to report the presence of any offensive or sexually explicit materials in the workplace, or any behavior that could be considered a violation of either the State's Sexual Harassment Policy or the Hospital's Customer Service Guidelines."

Further, contrary to the State's assertion that the Board's order suggest that New Hampshire Hospital is "lax in its training of these employees," the Board concluded that the training appears to be ineffective, as none of the witnesses interviewed during the course of New Hampshire Hospital's investigation exhibited any actual understanding of what would or would not constitute a violation of the State's Sexual Harassment Policy.

The State asks the Board to order "a rehearing" on the issue of training "..in order to present detailed evidence of the curriculum of this training and to show the PAB the videotapes used to educate employees." That request is denied, as the Board's evaluation of the training materials themselves has no bearing on the efficacy of that training in the workplace.

The Board truly appreciates the agency's compliance with its order for reimbursement of the appellants lost wages. The Board also understands the agency's desire to impose some other level of formal disciplinary action. The Board believes that the counseling memoranda, while not disciplinary in nature, will serve the purpose of clearly putting the appellants on notice that any similar violation in the future can result in their immediate dismissal without prior warning under the provisions of Per 1001.08.

For all the reasons set forth above, the State's Request for Relief is DENIED.

FOR THE NH PERSONNEL APPEALS BOARD

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State of New Hampshire

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Consolidated Appeals of:

German Sanchez (Docket #2004-D-018) and Thomas Roberts (Docket #2004-D-019)

New Hampshire Hospital

May 31,2006

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Reagan) met in public session on Wednesday, December 21,2005, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the consolidated appeals of German Sanchez and Thomas Roberts, employees of the MEG Unit (Maintenance, Engineering and Grounds) at New Hampshire Hospital. The Appellants, who were represented at the hearing by SEA Field Representative Margo Steeves, were appealing their suspensions without pay for allegedly failing to comply with the State's Policy on Sexual Harassment, failing to maintain a safe work environment in the Pipe Shop, and failing to follow NHH Customer Service Guidelines. Attorney Raymond S. Perry appeared on behalf of New Hampshire Hospital and the Department of Health and Human Services.

On September 27,2005, Ms. Steeves filed a Motion to Dismiss on the Appellants' behalf, arguing that New Hampshire Hospital failed to follow its own rules and the Rules of the Division of Personnel when it suspended the Appellants, and that they were therefore entitled to reinstatement without loss of pay. She also argued that the Appellants' suspensions, for ten days and five days respectively, were unduly harsh for the alleged infractions. Attorney Perry filed the State's Objection on October 7,2005, and Ms. Steeves provided a Response to that Objection on October 19,2005. The parties appeared before the Board on December 7,2005, and offered oral argument on the Motion, Objection and Response. The Board issued a decision on December 15,2005, denying the Appellants' Motion.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, and various documents that were marked and admitted into evidence at the December 7,2005 hearing on pending motions, and at the December 21,2005 hearing on the merits of the appeals:

Joint Exhibits

1. Joint Stipulations, Appeal of German Sanchez
2. Joint Stipulations, Appeal of Thomas Roberts

State's Exhibits

A. Color copy of a photograph taken in the "Old Pipe Shop" showing a makeshift entertainment center with 2 televisions, a VCR, and microwave oven
B. Copy of a photograph taken in the "Old Pipe Shop" showing wooden lockers with a poster of a nearly nude female skier
C. Color copy of a photograph taken in the "Old Pipe Shop" showing an assortment of adult and pornographic magazines and videotapes
D. Color copy of a photograph taken in the "Old Pipe Shop" depicting the degree of disarray
E. Organizational Chart of the NHH Maintenance Department
F. Signed "Acknowledgement of Sexual Harassment Awareness Training" attended by Thomas Roberts on December 1, 1993
G. Signed "Acknowledgement of Sexual Harassment Awareness Training" attended by German Sanchez on January 12,1994

Appellants' Exhibits

1. New Hampshire Hospital Safety Management Communication dated 2/8/2004 signed by Brian L. Fitts, Safety Manager
2. New Hampshire Hospital Work Order issued 12/06/05 to "clean up old shop"

The Board granted the State's motion to sequester the witnesses. The following persons then gave sworn testimony:

Thomas Roberts, Appellant
German Sanchez, Appellant
Marie Ann Lang, former NH Hospital Human Resources Administrator
Frank Harris, Assistant Chief, NH Hospital Campus Police
Brian Fitts, Healthcare Safety Engineer
Michael Nolan, State Police Trooper

Preliminary Matters

Attorney Perry said that during the investigation Mr. Sanchez told investigators that on two or three occasion during the previous year, he had watched pornographic videos in the Pipe Shop for two or three minutes at a time; later, however, Mr. Sanchez denied making those statements. Attorney Perry asked the Board order the Appellant to produce certain documents that the State would then use to challenge the Appellant's credibility. Ms. Steeves argued that the information in question dated back approximately ten years, was highly prejudicial, and was not relevant to the instant appeal. After reviewing the request, the Board agreed with the Appellant that the information was old, prejudicial, and irrelevant to the current appeal. They then voted to deny the State's request.

As the hearing progressed, Ms. Steeves questioned Mr. Sanchez about his military record and his service during the Viet Nam War. Mr. Perry objected, saying that if Mr. Sanchez's conduct and record from ten years earlier was irrelevant, his thirty-year-old combat record was even less relevant. The Board concurred. They advised the parties that neither Mr. Sanchez's civilian nor military record dating back ten to thirty years had any bearing on the instant appeal and would not be considered.

Position of the Parties

Attorney Perry argued that as supervisors in Maintenance, Engineering and Grounds (MEG) at New Hampshire Hospital, the Appellants are responsible for maintaining a safe and appropriate workplace environment He argued the Appellants failed to maintain safe working conditions in the Pipe Shop at the Main Building, allowing the shop to fall into disarray, with pieces of pipe, plumbing parts, debris, and cutting oil left on the floor of the shop. He argued that conditions were sufficiently hazardous that the Hospital's Safety Engineer decided to close the shop until it could be cleaned and safe working conditions restored. Attorney Perry also argued that the Appellants violated the State's Sexual Harassment Policy and NH Hospital Customer Service Guidelines by permitting a substantial amount of sexually explicit material, including a poster and a significant number of adult- and XXX-rated videos and magazines, to remain in the shop, accessible to anyone who worked there.

Ms. Steeves argued the agency failed to utilize progressive discipline, that suspension was too harsh a discipline under the circumstances, and that the decision to discipline the Appellants was unjust. She also argued that New Hampshire Hospital violated the Rules of the Division of Personnel at the pre-disciplinary meetings by failing to provide the Appellants with all the evidence that the agency considered when it suspended the Appellants.

Narrative Summary

The underlying facts are not in dispute. In early November 2003, upon information and belief that a contract employee had been observed watching a pornographic video in the "Old Pipe Shop," and that there were pornographic materials in at least one of the "remote shops" on New Hampshire Hospital Grounds, Assistant Hospital Superintendent Patricia Cutting initiated an internal investigation. At approximately 9:00 a.m. on November 7,2003, Ms. Cutting directed all staff in MEG (Maintenance, Engineering and Grounds) to report to the central office and remain there until released back to their work assignments and/or shop areas. Internal investigators, including Human Resources Administrator Marie Lang, Campus Police Chief

Charles Goodale, and Assistant Campus Police Chief Frank Harris, were dispatched to each of the remote shop locations to look for pornographic materials.

When investigators arrived at the "Old Pipe Shop" in the Main Building around 9:15 a.m., they found the shop unlocked. They also found that the windows were boarded over. When they entered the shop, they found it to be dirty and in disarray. They also reported the following:

> "Located in the first room [of the shop] was a table, hutch style cabinet containing two televisions, a VCR, several upright cabinets, miscellaneous piping and supplies, an old hi-fi stereo cabinet and other assorted items. A search of the desk drawers revealed pornographic magazines in each of the three drawers. On the wall directly behind the desk was a poster of a female in a tight tank top. In the hi-fi cabinet Assistant Chief Harris found a VHS cleaner tape and 6 or 7 XXX rated videos.
>
> "The search continued into the bathroom of the Pipe Shop where Assistant Chief Harris found adult magazines in a small green shelf located next to the toilet. Upon entering the rear of the shop, Chief Goodale found a suggestive poster with a female wearing a thong, ski boots and holding ski poles hung up on a green upright cabinet near a workbench. Chief Goodale opened the unlocked cabinet and found a large plastic garbage bag on the top right shelf. He opened the bag and found XXX videos (11)." [See State's Exhibits A, B and C[1], and Thomas J. Roberts' January 22,2004 letter of suspension]

Investigators photographed the area, collected and cataloged the adult and pornographic materials that were stored in the work area, and summoned Healthcare Safety Engineer Brian Fitts to the shop to assess the overall health and safety conditions. Mr. Fitts found a number of health and safety violations including cutting oil spilled on the floor, parts improperly stored and

[1] Although most of the videotapes appeared to have been produced commercially, several had no commercial labeling or branding, so it was not immediately clear what the tapes might contain. As a result, hospital administrators requested assistance from the Division of State Police to review those materials and determine whether or not the videos might include evidence of child pornography or other illegal activity. Once it was determined that the tapes did not include any evidence of child pornography or other illegal activity, State Police concluded that a full criminal investigation would not be necessary.

various materials and pieces of debris blocking points of egress from the shop. He ordered the Old Pipe Shop closed until it could be cleaned-up, and the violations corrected.

The Old Pipe Shop, one of the "remote shops" located on the NH Hospital campus, is used for storing parts as well as for cutting and threading pipe. Although work is performed there regularly and employees regularly enter the area to pick up parts, it is not considered a "primary shop." According to Assistant Chief Harris, when he first visited the shop as part of the internal investigation, he believed that, "It was a pretty normal looking shop," although he did indicate that it was "in disarray" when compared to the other remote shops that he visited.

State Police Officer Nolan and Assistant Chief Harris testified that among the employees interviewed during the investigation, only Mr. Sanchez admitted to watching adult or pornographic videos in the shop. Mr. Sanchez reportedly told investigators during his first interview that he had watched 2-3 minutes of pornographic videos on 2 or 3 occasions during the previous year. He later denied making any such admission, and said that he had watched his own videos, a film called "Warriors" and a Leslie Nielsen film, just to make sure that they still would play. Mr. Sears reportedly told investigators that he had picked up the pornographic videos but had never watched them. Mr. Cronin told investigators that although he saw the DHHS contractor watching a pornographic video, he did not watch the video, and continued working.

In the "Report of Administrative Findings" attached as Exhibit 9 to Mr. Sanchez' notice of appeal, it is reported that both Mr. Sears and Mr. Sanchez told investigators that employees in the Pipe Shop would watch the news for 10 or 15 minutes in the morning. Although both Appellants indicated that that the Pipe Shop was not regularly used for breaks, the presence of 2 television sets and a VCR near the desk, the VHS tapes nearby, and the fact that a contract employee was discovered watching pornographic videos in the shop, certainly would suggest otherwise.

Mr. Roberts testified that he knew there were inappropriate magazines in the shop, but insisted that he knew nothing about the televisions sets, the VCR, or any of the videos. Other employees told investigators that they did not believe anyone in the chain of command above Mr. Sanchez knew that there were any sexually explicit materials in the Shop.

Officer Nolan and Assistant Chief Harris testified that Mr. Sanchez initially denied knowing that there were pornographic videos in the shop, and later admitted that he was aware of the poster, magazines and videos, saying he simply had stopped noticing them because they'd been in the shop for such a long time. Among the rest of the employees, it was widely known that there were pornographic materials in the shop. According to the Report of Administrative Findings prepared by Ms. Lang, "Some materials dated back to the 70s and as current as 2002. It appears that staff accepted the materials as part of a cultural norm."

In consideration of the pleadings, stipulations, sworn testimony and documentary evidence admitted into the record, the Board made the following findings of fact and rulings of law:

Findings of Fact:

1. After receiving notice through a Department of Corrections employee that a Department of Health and Human Services contractor had been discovered in the Old Pipe Shop watching pornographic videotape, Assistant Superintendent Cutting initiated an investigation.
2. The investigation uncovered substantial amounts of adult and pornographic materials including posters, magazines and videotapes dating back as far as 1967, in the Old Pipe Shop. No pornographic material was discovered in any of the other "remote shops."
3. Although none of the employees admitted to watching the pornographic videotapes, State Police Officer Nolan concluded that one or more of the employees had watched the videotapes more than once, and that those employees were "minimizing."
4. There is no evidence of any complaint made by any MEG employee concerning the presence of suggestive, adult, or pornographic materials in the Pipe Shop.

5. There is no evidence of regular visits to the Pipe Shop by safety inspectors or program managers until management received a report that a DHHS contract employee was watching pornographic videotape in the Old Pipe Shop.
6. In light of the information disclosed during the investigation, and after meeting with the Appellants, Ms. Cutting issued written warnings to the non-supervisory personnel who .worked in the shop. She suspended Mr. Roberts without pay for five days, and suspended Mr. Sanchez without pay for ten days. A fifth employee was also suspended without pay for some period of time.
7. According to Ms. Lang, if investigators had not discovered pornographic materials in the shop, and if the only finding was that the shop was in disarray, it is unlikely that either of the Appellants would have been suspended.

Rulings of Law:

A. All State employees are subject to the provisions of the State of New Hampshire Policy on Sexual Harassment.

B. The State of NH Policy on Sexual Harassment defines sexual harassment as "…an unwelcome sexual advance, a request for a sexual favor, or other verbal or physical conduct of a sexual nature... when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of or creating an intimidating, hostile or offensive working environment... Other sexually harassing conduct, whether committed by supervisory or non-supervisory personnel is also prohibited. Such conduct includes, but is not limited to: … the display in the workplace of sexually suggestive, sexually demeaning, or pornographic objects, pictures, posters, or cartoons..."

C. Chapter Per 1000 authorizes an appointing authority to select from several forms of discipline, ranging from a written warning to termination, in cases involving sexual harassment.

D. Chapter Per 1000 of the NH Code of Administrative Rules authorizes an appointing authority to select from several forms of discipline, ranging from a written warning to termination, in cases involving failure to meet work standards.

E. In accordance with RSA 21-I:58, I, "...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."

Due process:

The Appellants argued that the State deprived them of due process by failing to provide notice of everything that the appointing authority may have "considered" in deciding to suspend them. By way of example, Ms. Steeves argued that the agency failed to disclose that there had been a conversation between Ms. Lang, then the Human Resources Administrator, and Ms. Cutting about the various disciplinary options. She also argued that the Appellants were deprived of their due process rights when the agency failed to inform them Ms. Lang had had a follow-up conversation with one of the officers after Mr. Sanchez challenged the investigative findings.

The Board does not agree. Per 1001.05 **(f)** (1) states:

> "No appointing authority shall suspend a classified employee without pay under this rule until the appointing authority: (1) Offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to suspend the employee."

The rule does not require an agency to create a statement detailing everything that it did, nor does it require the agency to provide employees with copies of everything that it may have reviewed before reaching its decision to discipline an employee. New Hampshire Hospital did what Per 1001.05 **(f)** requires by presenting the evidence that it believed supported the decision to suspend. A broader interpretation of the rule, such as that suggested by the Appellants, would

impose an all but impossible burden for agencies to meet, and would render meaningless the actual protection that the rule is intended to provide.

An employee who is alleged to have committed an offense is entitled to know the nature and extent of the alleged offense, and the employee is entitled to know what evidence the agency ultimately relied upon in reaching that conclusion. In the case of both Mr. Roberts and Mr. Sanchez, New Hampshire Hospital advised them that they were facing possible suspension for engaging in prohibited conduct as described by the State Policy on Sexual Harassment, for safety code violations by allowing unacceptable conditions to exist at the Pipe Shop, and for violation of the'agency's Customer Service Guidelines by failing to act professionally in the conduct of their work. They were also advised of the investigative findings, as well as the information supporting those findings.

On January 22,2004, Thomas Roberts and his representative Jean Chellis attended an "intent to suspend meeting" in Ms. Cutting's office, where Mr. Roberts was given a draft of the letter of suspension to review. The letter described in detail the investigation at the Pipe Shop, including the materials that were discovered, conditions at the shop, and statements made by the Appellant to investigators. The letter detailed the conduct for which the Appellant was suspended, as well as the policies and procedures that the Appellant was believed to have violated. A similar meeting was held in Ms. Cutting's office with German Sanchez and Ms. Chellis on January 23, 2004. Again, the letter presented by Ms. Cutting contained a detailed description of the internal investigation, the evidence that the agency believed supported the decision to suspend, and the policies and procedures that the Appellant was believed to have violated. Both Appellants had ample opportunity to challenge that evidence and explain why they believed that no discipline or some lesser form of discipline should be imposed.

In the case of Mr. Roberts, the letter of suspension that was ultimately issued to him following the meeting in Ms. Cutting's office indicates that the Appellant wanted a portion of the letter corrected to reflect that, when he realized there were some offensive materials in the workplace, he had taken steps to have them removed. The requested corrections were made. In the case of

Mr. Sanchez, the Appellant took issue with the investigators' assertion that he had admitted to watching two to three minutes of pornographic videotapes two or three times during the previous year. The agency obviously chose to believe the investigators rather than Mr. Sanchez, as is reflected in his notice of suspension.

The Appellants' assertion that the agency failed to comply with Per 1001.05 (f) is simply unsupported by the record or by a reasonable reading of the rule.

Sexual Harassment

According to the Equal Employment Opportunity Commission, "Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome."

Although the investigators were certainly offended by the posters, magazines and videotapes they found in the Pipe Shop, there was no evidence of any complaint from any employee who worked in the shop that the presence of pornographic materials made them uncomfortable or interfered with their work performance. Clearly the presence of those materials in the shop could be considered, "...explicitly or implicitly a term or condition of an individual's employment..." as described by the State Sexual Harassment Policy. However, there is no evidence that the presence of those materials created an intimidating, hostile, or offensive working environment, or that any of those assigned to the crew found the conduct to be unwelcome. In fact, the fifteen

or so employees who were interviewed all reportedly told investigators that the posters, magazines and tapes had been in the shop so long, no one really "saw" them any longer.

The absence of an identified "victim" in this instance does not relieve the agency or the Appellants of their obligation to promote a positive working environment and take whatever steps are necessary to protect employees from sexually offensive materials in the workplace. The agency, however, bears responsibility for first ensuring that supervisors understand the policy and the extent of their responsibility for enforcing it.

The investigators' report states, "All staff stated that they received training on the State's Sexual Harassment Policy. It appears that there is a disconnect between training and application. Supervisors have the duty if they know or should have known about offensive materials in the work place to take affirmative action. The attempts to remove materials were perfunctory at best and never followed up on. The actions of the supervisors had the potential of creating a significant liability for the hospital, the department and the State of New Hampshire."

According to the employees who were interviewed, training consisted of little more than reviewing the policy during initial employee orientation and reviewing it again during annual performance evaluations. It also appears that employees came away from whatever training they received believing that there was no violation of the policy unless someone was offended. Neither the Appellants nor employees from the shop seem to have understood that an employee might not be guilty of actual sexual harassment, but could still be in violation of NHH Customer Service Guidelines or the State Sexual Harassment Policy by allowing a potentially hostile work environment to exist.

Safety Violations

Although the evidence clearly reflects that the Pipe Shop was "in disarray" when investigators arrived to inspect it, Assistant Chief Harris described the conditions as "fairly normal" for a shop of its type. The Pipe Shop is not a "primary shop" and managers above the level of the

Appellants in the chain of command seldom visited the area. In fact, the investigators indicated in their report that the shop is essentially "out of sight, out of mind." Also, according to the witnesses and the documents admitted into evidence, Maintenance, Engineering and Grounds (MEG) has been short-staffed for some time, and upkeep of the shop is one of many competing priorities. As Mr. Fitts noted in his "Customer Service Comparison Audit Request" dated February 8,2004 (Appellants' Exhibit 12), because MEG has responsibilities throughout the facility and priorities that shift, their own needs frequently "…are left second to the needs of others."

Decision and Order

In the Board's opinion, responsibility for addressing the apparent "disconnect" between the Hospital's sexual harassment training and enforcement of the State's Sexual Harassment Policy throughout the various work areas extends well beyond the front-line supervisors. While the Board takes seriously the need to enforce the Policy, suspending employees who don't appear to understand the policy will do little to ensure compliance, particularly when management personnel has failed to visit the work area or provide regular and appropriate follow-up. The mere fact that the offensive materials had been in the workplace for more than a decade without personnel from Safety or Security noticing suggests that the problem is as much an institutional problem as it is a matter for discipline. Rather than imposing formal discipline, particularly discipline as harsh as unpaid suspensions, New Hampshire Hospital should have removed the offensive materials and immediately undertaken remedial training for all personnel in Maintenance, Engineering and Grounds to ensure that all employees understood their responsibility to report the presence of any offensive or sexually explicit materials in the workplace, or any behavior that could be considered a violation of either the State's Sexual Harassment Policy or the Hospital's Customer Service Guidelines.

With respect to the various safety violations and the Appellants' responsibility to maintain a safe workplace, the Board also found that suspension was too harsh a penalty. As Ms. Lang testified, the Appellants would not have been suspended solely on the basis of conditions in the shop.

Given the circumstances and staffing, the absence of any prior counseling or discipline for similar work performance deficiencies, and the apparent lack of management oversight, the Board found that suspension without pay was far too severe as a first step in the performance management process.

On all the evidence and argument offered by the parties, the Board voted unanimously to GRANT the appeals of Thomas Roberts and German Sanchez. The notices of suspension are to be expunged from their records and replaced with counseling memoranda detailing their individual responsibilities with respect to shop safety and compliance with State and agency policies and procedures. The Appellants are to be reimbursed for lost wages in accordance with the provisions of RSA 21-I:58, I.

THE PERSONNEL APPEALS BOARD

Philip Bonafide, Acting Chair

Robert Johnson, Commissioner

John Reagan, Commissioner

cc: Karen Levchuk, Director of Personnel
Attorney Raymond Perry, Department of Health and Human Services
Margo Steeves, SEA Field Representative

State of New Hampshire

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Appeal of German Sanchez (Docket **#2004-D-018)**
and
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Consolidated

New Hampshire Hospital

Personnel Appeals Board Decision on:
Appellant's Motion to Dismiss
State's Objection to Motion to Dismiss
Appellant's Response to State's Objection to Motion to Dismiss

*December **15, 2005***

The New Hampshire Personnel Appeals Board (Wood, Johnson, Bonafide and Reagan)[1] met on Wednesday, December 7,2005, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules to hear oral argument on the Appellants' Motion to Dismiss, the State's Objection to that Motion, and the Appellant's Response to the State's Objection in the above titled appeals

German Sanchez, an employee of New Hampshire Hospital, is appealing a ten-day suspension without pay for failure to comply with the State's Policy on Sexual Harassment, to maintain a safe work environment in the Pipe Shop, and to follow NHH Customer Service Guidelines. Thomas Roberts, an employee of New Hampshire Hospital, is appealing a five-day suspension without pay for failure to comply with the State's Policy on Sexual Harassment, to maintain a safe work environment in the Pipe Shop, and to follow NHH Customer Service Guidelines. In pleadings

[1] Without objection by either party, the Board sat *en banc*.

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submitted by the appellants requesting a hearing, the appellants argued that New Hampshire Hospital failed to follow its own rules in suspending them, and that the discipline was too severe for the alleged infraction. The appellant further argued that because the agency failed to provide all the evidence it had gathered prior to the suspensions, the agency violated Per 1001.05 (f)(1), and that the appellants were therefore entitled to reinstatement without loss of pay, seniority or status.

Specifically, the Appellants argued that at their "intent to suspend" meetings, New Hampshire Hospital provided only a "section of the police report" generated during the investigation of the Appellants' alleged misconduct. They argued that Per 1001.05 entitled them to receive a copy of the police report in its entirety before New Hampshire Hospital could suspend them. In support of that argument, Ms. Steeves wrote:

> "In the case of Ed Boulay, the Supreme Court in its March 5, 2998, decision ruled that NHTI officials' failure to provide Mr. Boulay with all of the evidence on which they based their decision to dismiss him was a violation of Per 1001.08(f)(1) and ruled that because NHTI violated the administrative rule the petitioner was entitled to reinstatement and back pay and benefits."

Finally, Ms. Steeves argued that the discipline itself was unfair. She asserted that an employee of the Division of Behavioral Health witnessed a contractor engaging in the same conduct for which the Appellants were suspended, yet neither the contractor nor the Behavioral Health employee responsible for supervising him were disciplined.

In his October 7,2005 Objection to Motion to Dismiss, Attorney Perry argued that New Hampshire Hospital was not obliged to turn over the complete police report, only that portion of the report that New Hampshire Hospital believed supported the decision to suspend, and only the details of the investigation specific to each of the Appellants. Attorney Perry noted that the State did not intend to offer the full report into evidence, as much of the information contained therein was extraneous and had nothing to do with the Appellants or the appointing authority's decision to suspend them. Attorney Perry argued that the other evidence concerning safety violations was detailed in each of the pre-disciplinary notices, that the Appellants had already received notice of the violations, and

that the agency was under no obligation to duplicate or provide additional copies of evidence that the Appellants had already received in one form or another.

Attorney Perry argued that the Court's decision in Boulay protects employees from "trial by surprise," noting that in the present appeal, there is no surprise. He wrote:

> "The case cited by the NH Supreme Court [in the Boulay appeal], Ackerman v. Ambach, 530 N.Y.S. 2d 893, 894 (App. Div. 1988), stands for the proposition that the employee is entitled to understand the charges against.him in order to prepare an intelligent defense. The SEA cannot claim'that they have been prejudiced in the preparation of their defense."

Finally, Attorney Perry argued that there was no basis for disciplining an employee of the Bureau of Behavioral Health who reported misconduct by a private contractor. He argued that although the Behavioral Health employee had no supervisory authority over private contractors, he took appropriate steps in notifying the proper authorities when he learned of the private contractor's misconduct.

On October 19,2005, Ms. Steeves submitted the Appellant's Response to Objection to Motion to Dismiss and Request for Postponement of Hearing. The Board granted the latter request, agreeing to reschedule oral argument on the Appellants' Motions and the State's Objection.

In the Appellants' Response to Objection, Ms. Steeves reiterated her original position, that before the Appellants could be suspended, they were entitled to see and receive the complete police report as well any other document that New Hampshire Hospital might have reviewed in relationship to their suspensions.

During oral argument before the Board on December 7, 2005, both parties restated their original positions. The Board admitted into the record the Affidavit of Marie Ann Lang, offered by the State in support of its Objection. Ms. Steeves argued that the Affidavit only provided further evidence that the State failed to provide the Appellants with all of the evidence it considered in deciding to suspend them without pay. Finally, Ms. Steeves argued that the Personnel Rules required the

appointing authority to meet with the Appellants, not someone designated by the appointing authority to carry out that function on his or her behalf.

After considering the pleadings and the parties' arguments, the Board voted unanimously to DENY the Appellant's Motion, and will hear the consolidated appeals on their merits on Wednesday, December 21,2005, as already scheduled.

Per 102.07 of the NH Code of Administrative Rules defines "Appointing authority" as meaning, "the officer, director, board, commission, or person designated in writing having the power to make appointments in the state classified service in a particular agency." Per 1001.05 (f) requires the "appointing authority," not necessarily the agency head, to meet with the employee prior to suspension. Whether or not Ms. Cutting or any other employee of NH Hospital was authorized to act as the appointing authority in this case is a factual dispute that can not be resolved through mere argument..

Per 1001.05 (f) of the NH Code of Administrative Rules states, in pertinent part:

> "No appointing authority shall suspend a classified employee without pay under this rule until the appointing authority:
>
> (1) Offers to meet with the employee to present whatever evidence the appointing authority believes supports the decision to suspend the employee;
>
> (2) Provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority..."

Per 1001.05 (f) does not require the appointing authority to present all the evidence it may have gathered, only that evidence "...the appointing authority believes supports the decision to suspend the employee." Similarly, Per 1001.05 (f) does not require the appointing authority to hand copies of the evidence to the employee, particularly if that evidence has already been provided at some other time or in some other form. It simply requires that the evidence be presented. Based on the evidence presented at the hearing, the Board found that the appointing authority complied with Per 1001.05 (f).

For all the reasons set forth above, the Board voted unanimously to DENY the Appellants' Motions to Dismiss, and to hear the consolidated appeals on their merits on Wednesday, December 21, 2005, as currently scheduled.

FOR THE PERSONNEL APPEALS BOARD

Mary Ann Steele, SPHR
Executive Secretary

cc: Karen A. Levchuk, Director of Personnel
SEA Field Representative Margo Steeves
Attorney Raymond S. Perry