

State of New Hampshire



PERSONNEL APPEALS BOARD

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Joseph Waldvogel, Docket #2009-D-007

NH Department of Safety

April 6, 2009

The New Hampshire Personnel Appeals Board¹ met in public session on Wednesday, February 4, 2009, under the authority of RSA 21-I:58, RSA 541-A:31 and Chapters Per-A 100-200 of the NH Code of Administrative Rules to conduct prehearing conferences in several appeals, including the appeal of Joseph Waldvogel, an employee of the Division of State Police. Trooper Waldvogel, who was represented at the hearing by Attorney Kevin Buck, was appealing two written warnings and a five day suspension of eligibility for Extra Duty Details for allegedly violating Chapter 22-E of the Professional Standards of Conduct. Attorney Marta Modigliani appeared on behalf of the Division of State Police.

On September 7, 2008, Attorney Modigliani filed the agency's Response to Notice of Appeal and Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Appellant's Written Opposition to Motion to Dismiss and Prehearing Conference Submission of Joseph Waldvogel was presented to the Board by Attorney Buck on the morning of the prehearing conference.

In its Motion to Dismiss, the State argued that the warnings referred to in the notice of appeal were not actually letters of warning within the meaning of Per 1002.04 of the Rules of the Division of Personnel, and that suspension of the Trooper's eligibility for extra duty assignments did not qualify as a suspension without pay as described in Per 1002.06. Therefore, she argued, the Board lacked subject matter jurisdiction to hear and decide the appeal.

In his response, Attorney Buck argued that the letters at issue met four of the seven requirements enumerated in the Rules of the Division of Personnel, and therefore must be treated as written warnings for purposes of appeal. He also argued that suspending an employee's eligibility for extra duty assignments had the same effect on the employee's income as an actual suspension.

¹ The Board sat *en banc*. Members present included Patrick Wood, Philip Bonafide, Robert Johnson, Joseph Casey and James Mackay.

The Board reviewed the parties' submissions, the applicable personnel rules, the provisions of RSA 21-I:46, 57 and 58, and the Collective Bargaining Agreement between the State of New Hampshire and the NH Troopers Association.² For the reasons set forth below, the Board unanimously voted to dismiss the appeal as a matter outside the Board's subject matter jurisdiction.

1. According to RSA 21-I:46, I, "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.

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."

2. The instant appeal concerns a decision of the appellant's supervisor and the Director of the Division of State Police pursuant to the Division of State Police Professional Standards of Conduct as they apply to sworn personnel of the Division of State Police, and as noted in the 2007 Collective Bargaining Agreement between the State of New Hampshire and the NH Troopers Association in Article VIII. Section 8.1 of the Agreement states, in part, "Employee may work approved construction/overtime details in accordance with Division policy." Section

² <http://admin.state.nh.us/hr/cba/documents/CBA200709.pdf>

22-E.1.1.A of the State Police Professional Standards of Conduct defines Extra Duty Details as follows: "Extra Duty Details – Shall mean the providing of law enforcement services at construction sites, the escorting of oversize loads, special overtime patrol details and other designated voluntary assignments that are not related to the regular duties of a sworn employee." (Exhibit B)

3. A decision of the Director of State Police limiting a trooper's eligibility for voluntary assignments unrelated to his regular duties as a trooper would not qualify as a suspension under the provisions of the Rules of the Division of Personnel, which defines suspension as "...a leave of absence with or without pay for investigatory or disciplinary purposes." (Per 102.60, NH Code of Administrative Rules) Trooper Waldvogel was not placed on a leave with or without pay from his regular duties as a sworn employee, and therefore was not suspended under the provisions of Per 1002.06 of the Rules of the Division of Personnel. As such, the Board found that the decision limiting Trooper Waldvogel's eligibility for overtime patrol details was not a decision related to the Rules of the Division of Personnel as adopted by the Director of Personnel, and therefore not a matter subject to appeal under the provisions of RSA 21-I:58.
4. The August 15, 2008 letter received by Trooper Waldvogel did not constitute a written warning within the meaning of Per 1002.04 of the Rules of the Division of Personnel. The interdepartmental memorandum issued to Trooper Waldvogel on August 15, 2008 describes violations of the Division's Professional Standards of Conduct, instructs him to "...consider this a WARNING" for the first two violations, and advises him that he will be ineligible for off-duty compensation for a period of five days. Although the memorandum is signed by Trooper Waldvogel and his Field Area Captain, the memo does not meet the substantive requirements of Per 1002.04 for it to be treated as a letter of warning.

In accordance with Per 1002.04 (c), "Each written warning shall:

- (1) Contain a narrative describing in detail the reason for the warning;
- (2) List specifically the corrective action which the employee shall take to avoid additional disciplinary action, including the time frame, if any, in which the corrective action must be taken;
- (3) Notify the employee that failure to take corrective action shall result in additional disciplinary action up to, and including, discharge from employment;
- (4) Be signed by the supervisor who issues the written warning;
- (5) Inform the employee that within 15 calendar days of the notice, the warning may be resolved through the procedures for settlement of disputes pursuant to Part Per 205 or by appeal to the personnel appeals board;
- (6) Be signed by the employee receiving the written warning to acknowledge receipt of the warning provided, however, that:

- a. If an employee takes exception to the written warning, he may so note in addition to acknowledging receipt;
 - b. Notice that the employee takes exception to the warning shall not be deemed a properly filed appeal; and
 - c. Failure of the employee to sign the warning shall neither affect its validity nor delay the time for appeal therefrom; and
- (7) The original letter shall be issued to the employee and copies distributed to the:
- a. Employee's agency personnel file; and
 - b. Employee's file in the division."

The memorandum issued to Trooper Waldvogel explains the violations, advises him to be warned that his conduct in two instances violated the Division's Professional Standards of Conduct, informs him that he will be ineligible for additional compensation for overtime details that would be performed outside the scope of his regular duty assignments, and orders him to review and adhere to the Extra Duty Detail Professional Standards of Conduct. Although the memorandum includes some of the elements of a written warning, the memorandum does not inform Trooper Waldvogel that the memorandum is a letter of warning, that it is disciplinary, or that his failure to take corrective action will result in additional disciplinary action up to, and including, discharge from employment. The letter was not included in his Department of Safety personnel file, nor was it submitted to the Division of Personnel for insertion in his personnel file at the division. The letter does not advise Trooper Waldvogel of his appeal rights, nor does it inform him that he needs to acknowledge receipt. Accordingly, the Board found that the memorandum is not a letter of warning as described by Per 1002.04 of the Rules of the Division of Personnel, and not a matter subject to the Board's jurisdiction.

For all the reasons set forth above, 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 PERSONNEL APPEALS BOARD



Patrick Wood, Chair, NH Personnel Appeals Board

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