

State of New Hampshire



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

Appeal of Brynn Lovejoy

Docket #2014-T-005

Department of Safety

Division of State Police

March 14, 2016

The New Hampshire Personnel Appeals Board met in public session on Wednesday, December 2, 2015 and Friday, December 11, 2015, 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 Brynn Lovejoy, the Appellant. The following commissioners sat for this hearing: Chair, Charla Stevens, Esq., Vice-Chair, Norman Patenaude, Esq., Commissioner Christopher Nicolopoulos, Esq., and Commissioner David Goldstein. Ms. Lovejoy, who was represented at the hearing by John S. Krupski, Esq., appealed her termination as a State Trooper I from the Department of Safety, Division of State Police. Marta Modigliani, Esq., appeared on behalf of the Department of Safety, Division of State Police.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal, documents admitted into evidence and post-hearing briefs submitted by each party.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:

David Kane, State Trooper, Sergeant

David Parenteau, State Trooper, Executive Major

Appeal of Brynn Lovejoy
Docket #2014-T-005
Page 1 of 7

Michelle Caraway, Former Director of Human Resources/Department of Safety

Paul Hardcastle, State Trooper, Captain

Robert Quinn, State Police, Colonel

Dr. Richard Longpre, Clinical Psychologist

Aaron Elder-Linell, State Trooper

Brynn Lovejoy, Appellant

ISSUES OF LAW:

Per 1002.08(b)(2)

After carefully considering the parties' testimony, evidence and arguments, the Board made the following findings of fact and rulings of law:

FINDINGS OF FACT

1. Ms. Lovejoy was hired by the Department of Safety, Division of State Police on August 8, 2008 as a Probationary State Trooper. One year later, she was promoted to State Trooper I. (State's Exhibit #36 pp 140-141).
2. On September 9, 2013, New Hampshire State Police Dispatch received a telephone call from a man asserting he knew Ms. Lovejoy and that she had texted him claiming that she had been stabbed numerous times and was seeking medical advice. Upon arrival at Ms. Lovejoy's home, Sergeant David Kane found Ms. Lovejoy to be heavily intoxicated as evidenced by her slurred speech, the odor of alcohol on her breath and her unsteady gait. Sergeant Kane inquired as to if she was injured and Ms. Lovejoy responded in the affirmative and showed him her left arm. Sergeant Kane observed a wound up by the top of her forearm. The wound, however, appeared to be "at least a few days old, it was not bleeding, and it appeared to be scabbing over". Sergeant Kane spoke with Ms. Lovejoy's roommate who informed him that Ms. Lovejoy had "cut herself days earlier". (State's Exhibit #32 pp131-133)

3. Sergeant Kane transported Ms. Lovejoy to the hospital and discovered two other wounds on her shoulder. He reported that these wounds appeared older as they were “scabbing over and were not bleeding”. Ms. Lovejoy told Sergeant Kane that the injuries were self-inflicted and estimated that she had been self-injurious “a week or a few days prior” to September 9, 2013. In addition to the most recent wounds, Sergeant Kane noticed a “large number of old scars on her arms that had healed over and turned white.” Sergeant Kane also noticed “at least one reddish scar on her right wrist that looked older than the most recent wounds, but newer than the other scars that had completely healed and turned white”. (State’s Exhibit #32 pp131-133).
4. On or about September 23, 2013 Lieutenant Paul Hardcastle from the Professional Standards Unit notified Ms. Lovejoy, by way of correspondence, that the Unit had received a complaint concerning her actions on September 9, 2013. (State’s Exhibit #34 p137)
5. A hearing was held on September 24, 2013 and the Police Standards and Training Council voted to suspend Ms. Lovejoy’s police officer certification, based upon the evidence presented, pursuant to Pol 402.02(d), for an act of self-mutilation. (State’s 36 p 145). Ms. Lovejoy was notified by correspondence dated September 26, 2013. (State’s Exhibit #39 p167).
6. The New Hampshire Police Standards and Training Council Administrative Rule Pol. 402.02 (d) states, “A certification shall be suspended if the officer has attempted suicide or self-mutilation, or committed self-mutilation, until such time as an evaluation by a licensed psychologist selected by the council certifies the person as fit for duty”. (State’s Exhibit #41 p43).
7. A New Hampshire State Trooper I job specification states, in relevant part, “ Police Officer Certification: Candidates must be able to obtain police officer certification within the time frame established by the N.H. Police Standards and Training Council. Must

maintain police officer certification throughout tenure of service”. (State’s Exhibit #1 pp 1-3).

8. On or about September 11, 2013 Ms. Lovejoy’s treating psychologist, Ernie R. Downs, Ph.D., wrote to “Major Aucoin or To Whom it may Concern” and stated “Brynn Lovejoy has been meeting with me for weekly psychotherapy since June 17th of this year. She has been diligent in both her therapy with me and in her psychiatric medication regimen with Suellen Drake, APRN. She and I had anticipated that she would be able to return to work this month, but she had a serious setback last week. At this time I would anticipate that she would be able to return to work in from one (1) to three (3) months, although it is possible that she will never be able to resume her position”. (State’s Exhibit # 33 p136)
9. On September 27, 2013, Ms. Lovejoy received correspondence from Colonel Robert Quinn notifying her that a “Pre-Disciplinary Meeting” was scheduled for September 30, 2013 as a result of the suspension of her police officer certification. (State’s Exhibit #36 p 143).
10. The Pre-Disciplinary Meeting was held on September 30, 2013 and in attendance were Ms. Lovejoy, Colonel Robert Quinn, Lieutenant Paul Hardcastle, TFCs Marc Beaudoin, and Seth Cooper, New Hampshire Trooper’s Association representative. During this meeting, Ms. Lovejoy was presented evidence that indicated she was aware of the requirements that she maintain full-time police officer certification as established by the New Hampshire Police Standards and Training Council. Ms. Lovejoy did not refute the evidence that her police officer certification had been suspended.
(State’s Exhibit #36 pp 140-141).
11. On September 30, 2013 Colonel Quinn issued Ms. Lovejoy’s dismissal letter, which was signed by him, the Commissioner of Safety, John J. Barthelmes, and Ms. Lovejoy on the same day. Ms. Lovejoy was informed that she was dismissed effective immediately.

RULINGS OF LAW:

- A. Per 1002.08 (b)(2) of New Hampshire Code of Administrative Rules authorizes appointing authorities to dismiss an employee without prior warning due to a “loss or expiration of a license or certification or other form of permission required by the class specification or supplemental job description for the performance of the duties of a position”.

- B. Per Pol. 402.02 (d) of the New Hampshire Police Standards and Training Council Administrative Rules, “A certification shall be suspended if the officer has attempted suicide or self-mutilation, or committed self-mutilation, until such time as an evaluation by a licensed psychologist selected by the council certifies the person as fit for duty”.

- C. According to Per-A 207.12 (b) of the Board’s rules, “In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence 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.”

DISCUSSION and ORDER

The State argued that Ms. Lovejoy, as a New Hampshire State Trooper I, was required to maintain police officer certification throughout her tenure of service as outlined in the job specification of a State Police Trooper I. Ms. Lovejoy’s police officer certification was suspended on or about September 24, 2013 due to her actions on September 9, 2013. Colonel Robert Quinn testified that at the time her certification was suspended she was working in the Narcotics Investigations Unit and, as a result of her certification suspension, she was not able to

carry out the duties of a State Police Trooper I and, more specifically, a detective in the Narcotics Unit.

In support of its argument, the State cited the *Appeal of Stuart P. LaValley*, Docket No.; 97-T-13, which was heard before the Personnel Appeals Board. Mr. LaValley was employed by the Department of Safety as a License Examiner for approximately twenty-five (25) years. During his tenure, his job performance was acceptable and he had never been subject to any prior discipline. Mr. LaValley was convicted of a violation, first offense, for driving under the influence of alcohol. One of the minimum qualifications of his position was to possess or be able to obtain a New Hampshire Driver's license. As a result of his conviction, his driver's license was suspended for ninety (90) days. Mr. LaValley was terminated and the Board subsequently denied his appeal because he was unable to perform the majority of his duty assignments for the period of his suspension.

Mr. LaValley argued in his Motion for Reconsideration, that he could have been suspended in lieu of termination without pay for up to twenty (20) work days pursuant to Per 1001.05(b)(3)c, for "failure to maintain" a required license or certification. The Board held, "that provision appears to contemplate a more immediately rectifiable lapse in licensure and not the situation where, as here, the Appellant could not lawfully perform the vast majority of his job functions for at least ninety days".

Although not precedent, the Board finds the *LaValley* case analogous to the present one. In the present case, Ms. Lovejoy's job specification clearly outlines that she must maintain her police officer certification throughout her tenure of service. Unlike in *LaValley* where he could not perform a majority of his duties due to his license suspension, Ms. Lovejoy's suspension of her police officer certification precluded her from performing any of the duties of her employment.

In *LaValley*, the Appellant and the State knew that the Appellant's license would be suspended for a definite amount of time, ninety (90) days. In contrast, neither Ms. Lovejoy nor the State knew when her police officer certification would be restored. In fact, her treating psychologist

indicated on September 11, 2013 that Ms. Lovejoy may never be able to resume her position as a State Trooper I.

Ms. Lovejoy also argued that the State failed to consider any other possible discipline other than termination. Ms. Lovejoy asserts that she could have been suspended without pay pursuant to Per 1002.06(a)(3)(e). This rule states, "an appointing authority may suspend an employee without pay for offenses including but not limited to the following...loss or suspension of a license, certificate or other form of permission required by the class specification or supplemental job description for performance of the duties of a position". Unlike *LaValley*, Ms. Lovejoy's loss of her police certification was indefinite as opposed to ninety (90) days. Again, her psychologist wrote on September 11, 2013, that he was uncertain if she would ever be able to resume her position. The Board believes it would be unreasonable to expect the State to suspend an employee indefinitely, especially considering the outstanding question as to whether Ms. Lovejoy would have ever returned to work.

In light of the fact that Ms. Lovejoy could not perform any of her duties as a State Trooper I as a result of her police officer certification suspension and the unknown amount of time before her return, if ever, the majority of the Board is persuaded that the appeal should be denied.

For all the reasons set forth above, a majority of the Board voted to DENY the appeal and to uphold the Department's decision to dismiss Ms. Lovejoy.

THE PERSONNEL APPEALS BOARD



Norman J. Patenaude, Vice-Chair

cc: Sara Willingham, Director of Personnel, 28 School Street, Concord, NH 03301

Attorney John S. Krupski, Milner & Krupski, 1 Pillsbury St., Suite 204, Concord, NH 03301

Attorney Marta A. Modigliani, Department of Safety, 33 Hazen Drive, Concord, NH 03301

Dissenting Opinion

I respectfully dissent from the conclusions reached by the majority of my board colleagues in this matter.

Per 1002.08(b)(2) states in pertinent part that an appointing authority may dismiss an employee without prior warning for offenses such as “**loss or expiration** of a license, certification or other form of permission required by the class specification or supplemental job description for the performance of duties of a position.” (emphasis added)

Per 1002.06(a)(3)(e) provides that an appointing authority may suspend an employee without pay for “**loss or suspension** of a license, certification or other form of permission required by the class specification or supplemental job description for the performance of duties of a position.” (emphasis added)

There is no dispute that Officer Lovejoy was required to maintain police officer certification throughout her tenure as a state police officer and that she could not perform her duties without having this certification in place. There is also no dispute that her certification was **suspended** indefinitely on or about September 24, 2013. Further Officer Lovejoy’s certification has since been reinstated.

Based on a plain meaning of the rules governing personnel actions, it appears that the appointing authority did not have the authority to terminate the employment of Officer Lovejoy. Per 1002.08 provides for termination without prior warning only in the event of loss or expiration of the certification, neither of which occurred here. Had the intention been to allow termination for suspension of a license or certification, the rule could have so stated. The appointing authority would have been within its right to suspend Officer Lovejoy’s employment until her certification was reinstated or could have gone through the steps set forth in the rules to progress to termination, but it did not.

Consequently, I would conclude that the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal in accordance with Per-A 207.12(b).



Charla Bizios Stevens, Chair