

State of New Hampshire



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

APPEAL OF MIGUEL ANDRADA

Docket #00-T-2

Department of Youth Development Services (Youth Development Center).

Response to Appellant's Motion for Reconsideration/Rehearing

May 1, 2000

By letter dated March 29, 2000, SEA General Counsel Michael Reynolds submitted Appellant's request for reconsideration/rehearing of the Board's March 22, 2000 decision in the above-referenced appeal. The State's Objection to that motion, dated March 31, 2000, was received by the Board on April 4, 2000.

In accordance with RSA 541:3 Motion for Rehearing. -

Within 30 days after any order or decision has been made by the [board], any party to the action or proceeding before the [board], or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the [board] may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The Appellant argued that:

1. The Board's decision failed to address evidence admitted into the record involving Mr. Tobey's alleged hostility to the Appellant, particularly with respect to the so-called "bad" evaluation.

2. Some at YDC allegedly perceived the Appellant's "cultural ways of expressing himself" as evidence that he was "violent and/or dangerous."
3. The agency factored into the termination decision evidence that was not provided to Mr. Andrada at or before the meeting at which he was notified of his termination.
4. Wearing shorts to work was not an offense warranting immediate dismissal.

Mr. Decker and Mr. Provencher both testified that Mr. Tobey's supervisory style was very direct and task oriented, and both testified that Mr. Tobey's evaluations of his subordinates were fair and accurate, even though they were not very tactful. Mr. Declter testified that the tone of the evaluation at issue was not unusual, and neither Mr. Declter nor Mr. Provencher disagreed with the contents of the so-called "bad" evaluation.¹ Therefore, although there was considerable testimony about that evaluation, the Board did not find it to be credible evidence of hostility toward the Appellant and therefore found that it was irrelevant to Appellant's termination for willful insubordination and threatening to injure another person in the workplace.

The Board continues to reject Appellant's claim that Mr. Andrada's conduct was a "cultural way of expressing" himself that was misunderstood by certain YDC staff. The argument itself is inconsistent with the evidence, as demonstrated by the testimony of Robert Decker and as noted in the Board's decision. Mr. Declter considered himself to be a friend of the Appellant and was familiar with his temperament and mannerisms. Nonetheless, he testified that he would have found the Appellant's behavior threatening in a confrontation like the one that occurred between the Appellant and Mr. Tobey on June 28, 1999.

The Appellant reiterated his argument that the agency failed to provide "whatever evidence" it factored into the decision to dismiss the Appellant, noting evidence cited on page 2 of the letter of termination. Commissioner Favreau testified that the information found on page 2 of the letter of termination was collected after his meeting with Mr. Andrada, when he advised the Appellant of his termination from employment. While that evidence supports the Commissioner's decision

¹ The "bad" evaluation to which the Appellant referred was never offered into evidence.

to dismiss the Appellant, the evidence reflects that the Commissioner neither had nor considered that information during his meeting with the Appellant. Accordingly, the Board found no evidence that the termination violated Per 1001.08 of the Rules of the Division of Personnel.

The Appellant's assertion that Mr. Andrada was dismissed because he wore shorts to work is simply unsupported by the evidence. Mr. Tobey and Mr. Andrada both testified that Mr. Tobey told the Appellant to go home to change into appropriate work clothing. Commissioner Favreau testified that if the Appellant had simply done what he was ordered to do, there would have been no disciplinary action.

For the reasons set forth above, the Board voted to DENY the Appellant's request for reconsideration/rehearing, and to AFFIRM its March 27, 2000 decision in the Appeal of Miguel Andrada.

THE PERSONNEL APPEALS BOARD



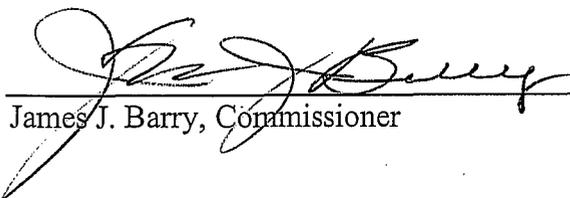
Patrick H. Wood, Chairman

Robert J. Johnson, Commissioner

Commissioner Barry's Response

Although I remain of the opinion that the offense in question did not warrant Mr. Andrada's immediate termination from employment, I agree with the majority that the Appellant did not set forth sufficient reason in his Motion for Reconsideration/Rehearing to warrant a reversal of the Board's original decision.

In general, a Motion for Rehearing must establish that the Board's decision is unlawful or unreasonable, or it must set forth additional evidence that was unavailable at the time of the original hearing. In this instance, the appellant has offered no new evidence or argument, and has set forth no good reason for the Board to determine that its original decision was factually or legally erroneous. Therefore, while affirming my dissent from the majority's opinion that termination was warranted in this case, I concur with the Board that the Appellant has not established good reason for either reconsideration or rehearing in his Motion.


James J. Barry, Commissioner

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APPEAL OF MIGUEL ANDRADA

Docket #00-T-2

Department of Youth Development Services (Youth Development Center)

March 22, 2000

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, January 19, 2000 and Wednesday, February 23, 2000 to hear the appeal of Miguel Andrada, a former employee of the Department of Youth Development Services. Mr. Andrada, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his termination from employment effective June 28, 1999, for allegedly being the aggressor in a fight or attempt to injure someone in the workplace, and for willful insubordination. Frances DeCunto appeared on behalf of the agency.

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

State's Exhibits

- A. June 28, 1999 Incident Reporting Form signed by Milton Tobey, Jr., Operations Officer I
- B. Handwritten note signed by Jane H. Merrill, RN II, dated 6-29-99
- C. Handwritten note dated June 4, 1999, addressed to the attention of Bob Boisvert
- D. June 27, 1999 Incident Reporting Form signed by Melanie Nicltersten

- E. June 28, 1999 Incident Reporting Form signed by Diane Marier
- F. Handwritten statement signed by Debra Enman, Human Resources Assistant III dated June 28, 1999
- G. Handwritten statement signed by Debra Enman, Human Resources Assistant III dated July 8, 1999
- H. July 2, 1999 letter of termination issued to Miguel Andrada
- I. Handwritten calendar notes signed by Bob Declter dated June 21, 1999
- J. Handwritten note dated June 18, 1999
- K. Department of Youth Development Services Policy "Employee Appearance and Conduct" dated 6/14/98

Appellant's Exhibits

1. March 25, 1999 letter signed by Robert Declter, Miguel Andrada and Phil Provencher
2. Performance Summary for Miguel Andrada dated 7/31/98

At the hearing, the following persons gave sworn testimony:

Milton Tobey, Jr., Operations Officer
Diane Marion
Debra Enman, Human Resources Assistant III
Melanie Nickerson, Treatment Coordinator
Brad Asbury
Peter Favreau, Commissioner
Robert C. Declter, Jr., Assistant Director of Residential Services
Phil Provencher, Operations Officer
Miguel Andrada, Appellant

At the appellant's request, the witnesses were sequestered, with instructions from the Chair that they were not to discuss their testimony with any other witness until a decision in the case had been rendered.

The incident giving rise to Mr. Andrada's termination occurred on June 28, 1999 at the Youth Development Center where Mr. Andrada was working as a Building Service Worker. The State asserted that Operations Officer Milton Tobey approached Mr. Andrada in the hallway near the school department and confronted him about wearing shorts to work, a violation of the DYDS Employee Appearance and Conduct Policy TDO-1-C-03. The State claimed that although the appellant acknowledged his understanding that he was not permitted to wear shorts at work, he became enraged when Mr. Tobey told him to go home and change into long pants. The State argued that the appellant yelled at Mr. Tobey, accused him of always picking on the appellant, and threatened to punch Mr. Tobey. The State asserted that Mr. Andrada's use of vulgar, offensive language coupled with the nature and intensity of his threats to punch in Mr. Tobey's face made Mr. Tobey fearful that he was about to be assaulted physically.

The appellant admitted that he yelled and used inappropriate language with Mr. Tobey, but he denied having threatened Mr. Tobey in any way. He asserted that Mr. Tobey was already upset and angry when he approached the appellant in the hallway. The appellant argued that Mr. Tobey started yelling, refusing to answer the appellant's questions about other maintenance staff who he had seen wearing shorts. The appellant argued that Mr. Tobey disliked him, picked on him, and simply used this incident as an excuse to terminate his employment. The appellant claimed that he did not use inappropriate language until after Mr. Tobey told him he "was done" or dismissed.

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

Findings of Fact

1. Mr. Andrada was hired by the Department of Youth Development Services in 1997 as a part-time Youth Counselor assigned to King Cottage. He was subsequently employed by the agency in a full-time temporary position as a courier. Mr. Andrada was selected for the position of Building Service Worker in February, 1998.

Mr. Andrada believed that Milton Tobey disliked him, describing Mr. Tobey's style of supervision as, "He's thinking lie's superman with me all tie time, all the time." He believed that Mr. Tobey piclted on him, singled him out to do work he should not have liad to do, and resented the fact that on at least two occasions, Mr. Andrada had challenged his authority by aslting the Director of Residential Services to over-rule his instructions.

3. The Department of Youth Development Services maintains a policy on appropriate attire for various classifications of employees. That policy proliibits maintenance personnel from wearing shorts while they are performing their maintenance and janitorial duties.
4. On June 18, 1999, Mr. Provenclier spolte to Mr. Andrada about not wearing shorts or sandals at worlt. He gave Mr. Andrada a copy of tie relevant policy and told him that if he liad any questions about the policy, he should take them up with Mr. Nadeau, Director of Residential Services.
5. On June 21, 1999, Robert Declter, Assistant Director of Residential Services also spoke to Mr. Andrada about the dress policy. Mr. Andrada informed him tliat Mr. Provencher had already discussed the issue with him and had given Mr. Andrada a copy of the policy.
6. On June 28, 1999, Mr. Andrada came to work weasing long pants, but changed into shorts after he saw two other employees, including one fi-om the maintenance department, wearing sliorts.
Debra Enman, a member of tie department's safety committee, noticed that Mr. Andrada was wearing shorts at work and reported it to Mr. Tobey in tie operations office.
8. Mr. Tobey said that he hadn't noticed what Mr. Andrada was wearing, but that lie would talk to the appellant when lie saw him.
9. Diane Marion, a Youth Counselor wlio was working in tie operations office at the time, saw Mr. Andrada in tie hallway outside tie office and waved to him to say hello. Ms. Marion said, "There's Miguel," and Mr. Tobey told Ms. Enman, "I'll be right back."
10. Mr. Andrada saw Ms. Enman in the office as well talking to Mr. Tobey, and he assumed that Mr. Tobey would come loolting for him to confront him about wearing shorts.

11. Mr. Tobey went into the hallway where Mr. Andrada was alone working and asked him if he knew that he wasn't supposed to be wearing shorts. Mr. Andrada answered that he knew about the policy, but wanted to know why other people were wearing them.
12. Mr. Tobey replied that he was not going to discuss the other employees at that time. He gave the appellant a direct order to punch out, to go and change into long pants, and to come back to work.
13. Instead of leaving as he was directed, the appellant accused Mr. Tobey of pickling on him and he insisted that Mr. Tobey explain why other employees were allowed to wear shorts.
14. Mr. Tobey refused to engage in any discussion with the appellant.
15. Mr. Andrada initiated a heated exchange, entering what Mr. Tobey described as his "safety space," yelling and calling Mr. Tobey a vulgar, offensive name, telling Mr. Tobey he'd like to punch his face in.
16. Although Mr. Tobey and the appellant had had verbal confrontations in the past, this was the first time that Mr. Tobey believed that the appellant actually intended to strike him.
17. Melanie Nickerson, a staff Treatment Coordinator, entered the hallway from the staff conference room with a parent and a juvenile, and saw the two men arguing.
18. Ms. Nickerson saw the appellant flailing his arms in front of Mr. Tobey, speaking very loudly. She was unable to hear specifically what the appellant was saying.
19. Ms. Nickerson heard Mr. Tobey say, "No, you've been rude, you've been vulgar, we're not going to talk about it." She believed that Mr. Tobey was trying to put an end to the conversation while Mr. Andrada was trying to continue it.
20. Mr. Andrada followed Mr. Tobey into the operations office demanding that Mr. Tobey discuss the matter with him.
21. Mr. Tobey said there would be no further discussion in light of Mr. Andrada's threats and what he'd said to Mr. Tobey.
22. Mr. Andrada began asking Debra Enman if she was aware of his "shorts problem" and demanded that Ms. Enman tell him which employees were permitted to wear shorts. Ms. Enman told the appellant that his situation had been discussed by the safety committee and that people in his position were not allowed to wear shorts or sandals to work.
23. Mr. Tobey told the appellant to turn in his keys and leave the grounds.

24. Ms. Marion did not hear the further conversation between Mr. Tobey and Mr. Andrada, although she did hear Mr. Tobey say to Mr. Andrada, "You're not going to threaten me."
25. Mr. Tobey reiterated his demand that the appellant turn in his keys and leave the grounds.
26. Mr. Andrada said he would leave, but continued talking to Ms. Enman in an increasingly loud tone.
27. Mr. Tobey told the appellant to turn in his keys and leave, otherwise he would call the Manchester Police Department and have the appellant arrested for trespassing.
28. The appellant left.
29. Mr. Tobey went into Commissioner Favreau's office and apprised him of what had just occurred. Shortly thereafter, Mr. Tobey returned to the office and told Ms. Enman that the appellant "was gone."
30. Ms. Enman took that statement to mean that Mr. Andrada was to be dismissed.
31. In a subsequent meeting with Commissioner Favreau, Ms. DeCunto and an SEA Steward, Mr. Andrada explained his version of the incident and denied having threatened to hit Mr. Tobey.
32. Commissioner Favreau found Mr. Tobey's description of the incident to be more credible than the appellant's explanation, and he dismissed Mr. Andrada from his position on the grounds that the appellant had been willfully insubordinate and had threatened Mr. Tobey with bodily harm.

Rulings of Law

- A. "Employees shall dress in clean, properly fitted and appropriate clothing which is suitable to their primary job function: a. Residential and Maintenance: Pants or jeans (dungarees) with pockets are appropriate for residential and maintenance staff while performing their primary duties. Sweatpants and shorts are appropriate for recreational activity, but should not be worn unless directly involved in a recreational activity." [Department of Youth Development Services Policy and Procedure Manual, Employee Appearance and Conduct (Section III-D-2-a.)]

- B. "Employees shall never use degrading or disrespectful remarks towards the youth in their care, other employees or the public." [Department of Youth Development Services Policy and Procedure Manual, Employee Appearance and Conduct (Section III-E-2)]
- C. "Dismissal shall be considered the most severe form of discipline. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as, but not necessarily limited to ... (4) Being the aggressor in a fight or an attempt to injure another person in the workplace [and] (9) Willful insubordination..." [Per 1001.08 (a)]
- D. "... If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay. ... 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." [RSA 21-I:58, I]

Discussion

The witnesses' testimony and their written statements provide very clear, consistent pictures of both Mr. Andrada and Mr. Tobey. Mr. Tobey is viewed by other supervisors and co-workers as very straight-forward, direct, and fair in his assessment of work that employees are expected to perform. Although there seems to be agreement among the witnesses that Mr. Tobey could be more diplomatic in his approach to supervision, there was no evidence that Mr. Tobey treated the appellant differently than any of his co-workers. Other than Mr. Andrada, none of the witnesses offered evidence that Mr. Tobey had any animosity toward the appellant.

By comparison, Mr. Andrada is viewed by his supervisors and co-workers as excitable and sometimes unpredictable. Mr. Provencher testified that the appellant's behavior at work was "anywhere from happy-go-lucky to upset about the smallest issues." Mr. Provencher described

the relationship between Mr. Andrada and Mr. Tobey as being like "hot and cold water." Mr. Provencher indicated that while Mr. Andrada generally did whatever he was told to do, the appellant would usually challenge or question similar orders that he received from Mr. Tobey. Although Mr. Provencher and Mr. Decker both considered themselves to be the appellant's friends, both men testified that the appellant could be confrontative and intimidating when he disagreed with someone. In fact, when questioned by the Board about any physical threat to Mr. Tobey, Mr. Decker indicated that he himself would have "been fearful, cautious for [himself]" in a face-to-face confrontation with Mr. Andrada had there been a dispute over something Mr. Decker directed him to do.

Mr. Andrada testified that a few days prior to his termination from employment, he was warned not to wear shorts to work. However, he said, no one warned him that he could be dismissed if he wore shorts to work. Mr. Andrada testified that he was actually wearing Bermudas, not shorts, on the date of the incident. He described shorts as "something you wear to a race." When questioned further, however, Mr. Andrada admitted that Bermudas were a type of shorts and that he knew they were not permissible attire for someone in his position because of safety reasons. Mr. Andrada also admitted that he knew Mr. Tobey would be upset if he were to find the appellant wearing shorts at work. When questioned about the reason for the policy, he said he thought perhaps the policy had changed, or, "The policy was maybe only for me. I don't know." When Ms. DeCunto asked him if it wouldn't have been a better idea to ask someone in the office to clarify whether or not the policy was in effect before deciding to change into shorts he answered, "Maybe. No big deal. Maybe you get lucky."

Mr. Reynolds argued that there was no threat made to Mr. Tobey. Rather, he suggested, the State had mischaracterized the incident and the appellant's behavior. Mr. Reynolds argued that there was obvious hostility on the part of Mr. Tobey toward Mr. Andrada, and that although the appellant was not alleging any racial bias, Mr. Tobey was one of several employees at YDC who were "afraid of this Hispanic man who talks loudly and waves his arms when he talks." He argued that there was "a mind-set that this man is dangerous," which contributed to the agency's allegation that Mr. Andrada's behavior actually constituted a threat.

Mr. Reynolds argued that when Mr. Tobey confronted the appellant about wearing shorts and told the appellant to go home to change, he gave no explicit warning that Mr. Andrada's failure to do so, without any opportunity to ask questions, would result in his termination from employment. He argued that while the appellant did question Mr. Tobey about the policy, he did not refuse a direct order to leave. Therefore, he argued, the State could not support its charge of willful insubordination and the termination must be deemed invalid on its face.

Finally, Mr. Reynolds argued that Commissioner Favreau factored evidence into the termination decision that was not disclosed to the appellant, that the appellant received no letter of termination at that meeting in order to know the extent of the charges against him, and that the appellant had no opportunity to refute such evidence. He cited written statements made by Ms. Marion, Ms. Nickerson and Ms. Enman, as well as a note from Nurse Jane Merrill in which she related an earlier incident with the appellant, as evidence factored into the termination that was not provided to the appellant at the time of termination. Therefore, he argued, the termination violated Per 1001.08 (c) and the appellant was entitled to reinstatement with back-pay and benefits under the provisions of RSA 21-I:58, I.

The State argued that Commissioner Favreau's decision to terminate Mr. Andrada's employment was made at the meeting with Mr. Andrada after hearing his version of the incident with Mr. Tobey. The State argued that Commissioner Favreau did not rely on evidence other than Mr. Tobey's and Mr. Andrada's descriptions of the incident in making his decision to terminate the appellant's employment. The State argued that Mr. Andrada could have avoided termination by simply doing as he was ordered, leaving the work site and changing into appropriate clothing. Instead, he refused to follow a direct order, initiated a confrontation and threatened his supervisor. Therefore, the State argued, the appellant violated Per 1001.08 by being willfully insubordinate and threatening another employee in the workplace.

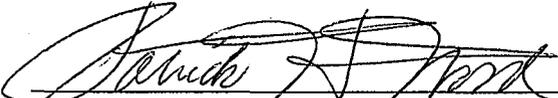
Decision and Order

Mr. Andrada knew that the Department's policy prohibited him from wearing shorts at work. Although he disagreed with the policy, he knew that the dress requirements involved safety issues. He admitted that he had a copy of the policy. He admitted that although he had arrived at work wearing long pants, he changed into shorts on the chance that "he might get lucky," even though both Mr. Provencher and Mr. Declter had warned him a few days earlier not to do so. He admitted that both Mr. Provencher and Mr. Declter had spoken to him about the policy, and that he knew Mr. Tobey would be upset if he were to find the appellant wearing shorts. He admitted that when Mr. Tobey approached him in the hallway, he knew precisely what Mr. Tobey wanted to see him about. Mr. Tobey ordered him to punch out, go home, change his clothes and return to work. Instead of doing what he was directed to do, Mr. Andrada began to yell and demand an explanation why others were permitted to wear shorts and he was not. When Mr. Tobey refused to engage in a further discussion, the appellant began yelling and physically threatened his supervisor.

The appellant engaged in a willful violation of the agency's policy, selecting a course of action that he knew would create conflict with his supervisor. When his supervisor approached him and instructed him to leave work and change into appropriate clothing, the appellant disobeyed a direct order to leave. He further exacerbated the situation by calling his supervisor an obscene name while threatening to punch him. Although the appellant attempted to characterize the incident as proof of aggressive, inappropriate behavior on Mr. Tobey's part, the evidence reflects that Mr. Tobey was simply carrying out his normal duties. There is no evidence that he anticipated or initiated a confrontation. Rather, the evidence reflects that the appellant knowingly and willingly created a situation that he knew would result in conflict with his supervisor. He was fully aware of the fact that the agency's policy directed Mr. Tobey to send the appellant home to change into appropriate clothing. When Mr. Tobey did precisely that, the appellant became enraged, disobeyed a direct order, and threatened to hit his supervisor.

For the reasons set forth above, the Board found that the appellant violated Per 1001.08 for willful insubordination and for threatening his supervisor. Therefore, the Board voted to DENY Mr. Andrada's appeal, affirming the department's decision to terminate the appellant's employment as a Building Service Worker.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner

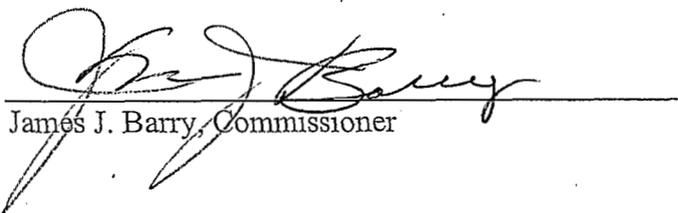
James J. Barry, Commissioner

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Dissenting Opinion

The appellant is guilty of insubordination but it does not rise to the level to justify termination, although some lesser discipline is definitely warranted.

The appellant's demeanor was affected when he was admonished by his supervisor in a public hall instead of a private office. This confrontation led to the utilization of abusive language. Some form of disciplinary action is warranted. For the above reasons, I respectfully dissent from the majority opinion.



James J. Barry, Commissioner