

State of New Hampshire

WPPID972



PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

James Bartlett
(Department of Transportation)
Docket #89-T-28

Response to Appellant's Motion for Reconsideration
and
State's Reply to Motion for Reconsideration

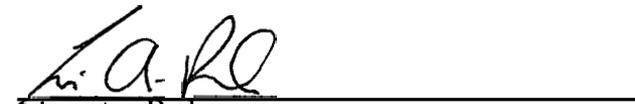
September 10, 1992

In consideration of the Appellant's Motion for Reconsideration and the State's Reply to said Motion, in conjunction with the June 19, 1992 decision of the Personnel Appeals Board in the matter of James Bartlett, the Board voted unanimously to deny the appellant's Motion. In so doing, the Board also voted to affirm its June 19, 1992 decision denying Mr. Bartlett's appeal.

THE PERSONNEL APPEALS BOARD


Mark J. Bennett


Robert J. Johnson


Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel'
Michael C. Reynolds, SEA General Counsel
Karen Levchuk, Attorney, Transportation Bureau
John Scott, Human Resources Administrator, Dept. of Transportation

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF JAMES BARTLETT Department of Transportation Docket #89-T-28

June 19, 1992

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met January 22, and January 27, 1992, to hear the appeal of James Bartlett, a former employee of the Department of Transportation. Attorney Karen Levchuk appeared on behalf of the Department. Michael Reynolds, SEA General Counsel, appeared on behalf of the appellant. At the conclusion of the hearing on the merits, the Board agreed to allow the parties ten additional days in which to file memoranda of law and proposed findings of fact and rulings of law. The Board convened on Wednesday, March 11, 1992, to consider these submissions, rule upon the admissibility of the tape recordings central to the termination, and to review the tapes, which it decided to admit into evidence, as discussed below.

In consideration of the evidence presented by the parties, the Board made the following findings of fact:

James Bartlett was employed by the New Hampshire Department of Transportation in the position of Public Informational Representative from July 21, 1986 through October 17, 1989, when he was discharged from employment. His letter of discharge stated, in pertinent part:

"On or about April 20, 1989 and on several occasions thereafter, you did tape record conversations between yourself and Commissioner Stickney, as well as others, without the permission, consent, or knowledge of those persons being recorded. You have violated the trust, goodwill, and confidence of the commissioner, co-workers, and other members of the Department. The Department views your actions as an offense giving rise to immediate termination pursuant to Per 308.03(1)."

The appellant was hired by DOT to work with the Public Information Officer, Pete Morrison, a former colleague of the appellant's from the commercial broadcast industry. Their relationship deteriorated within several months after Bartlett's appointment. The focal point of the disputes early in the appellant's employment was Diane Hartford, the Executive Secretary assigned to the Public Information Office who made no secret of her dislike for the appellant or her belief that he didn't do his share of the work in the office. The disputes escalated in the summer of 1987 when Jon Steiner was hired as a summer intern and assigned to the Public Information Office. The appellant had been assured Steiner would return to UNH in the fall, and that he was assigned to the Public Information Office solely because of a lack of work for him in "front office". Steiner did not return to school in the fall, and was assigned to do many of the assignments the appellant believed should have been his own.

In November, 1987, the appellant suffered a heart attack and was absent from work for several months. When he was cleared to return to work, he was informed that a third full-time position had been created in the office and that Jon Steiner had been hired permanently.

In the ensuing months, the appellant's authorization for use of "flex time" to attend cardiac rehabilitation classes was rescinded, requiring him to adjust class schedule. His name was dropped from departmental press releases, building directories and the bi-monthly publication "Transportation News". He became aware of correspondence dated May 23, 1988, placed in his personnel file in which Morrison, writing to then Assistant Commissioner Fletcher, labeled him "a loser" and made complaints such as:

"Without getting into a lot of detail, Jim's writing style has been a disappointment.. ."

"Probably the most disturbing aspect of his 1 1/2 year tenure with us is the fact that Jim has never done anything on his own or come up with any type of creative concept."

"On April 21st when Jim and ■ were discussing changing his hours he became enraged and called the Commissioners and Directors 'liars' exhibiting another childish display that is not uncommon on his part."

"I feel he has stabbed me in the back and stabbed NHDOT, particularly Commissioners and Directors in the back as well. In short, he is a loser." [SEE: Defendant's Exhibit 81

In November, 1988, Peter Morrison died of a heart attack and his position was filled in April, 1989, by Anthony Venti. During the fall of 1989, Venti began physically reorganizing the Public Information Office, moving files, desks, bookshelves and office partitions. During early October, Venti advised Bartlett, Steiner and Hartford that he would be rearranging their office, which he did on October 9 and 10, 1989. On October 16, 1989, while Bartlett was in the field on a work assignment, Venti began relocating materials on a bookshelf located near the appellant's desk and discovered an envelope box containing a hand-held, voice activated microcassette recorder, three audio cassettes which fit the recorder, and several computer floppy disks. By listening to the tapes, it was determined that the materials belonged to James Bartlett. Ownership of the materials was confirmed when Mr. Bartlett later requested the tape recorder, tapes and computer disks be returned to him, describing those items as his personal property.

The appellant was terminated from his employment by letter dated October 17, 1989. Mr. Bartlett, through his attorney Michael C. Reynolds, filed a timely appeal of his termination by letter to the Board dated October 19, 1989.

At the conclusion of Mr. Bartlett's hearing on the merits of his appeal, the parties agreed to a stipulation summarized as follows:

Mr. Bartlett knowingly, and with secret intent, tape recorded conversations with Commissioner Stickney and others without their knowledge or consent, implied or otherwise.

The appellant's memorandum of law presents two issues for the Board's consideration. We express these below employing therein the appellant's factual assertions, which we do not adopt:

1. Whether and to what extent a permanent state employee has a reasonable expectation of privacy in his personal belongings consisting of, among other things, a microcassette recorder and three microcassettes, which were stored in an unmarked, covered envelope box on a shelf, among other clearly personal items, in his unshared, appointed work area when his employer knew, or should have known, that such items were not state property and when the seizure and search, were not consented to or conducted because of allegations of employee malfeasance?

2. Whether the alleged taping of work-related conversations by a permanent state employee who is a party to the conversations at a state office building during regular working hours where the public may, and does, enter and which is done to enable him to refresh his memory at a later date for personal reasons only, justifies either a mandatory or optional discharge?

First, the Board found that no "search" occurred. The Board considered the discovery by Anthony Venti of the tape recorder, cassette tapes and computer disks to have been unintentional. The record reflects that the employees in Venti's work area were all familiar with his frequent reorganization of equipment within the office, including desks, filing cabinets and work tables. When Venti discovered the tape recorder, cassette tapes and computer disks, he was not conducting a "search" and it was not unreasonable for Venti to listen to the tapes to ascertain the identity of the owner or the contents of the tapes. Venti testified that he was interested in the tape recorder as a device that could be put to use by the Information Office.

The materials which Venti discovered were stored in a Department of Transportation envelope box of the type commonly used there, on a Department of Transportation shelf in a shared office, even though they were located on a shelf which contained a number of Mr. Bartlett's personal belongings, such as hats, photographs and awards. The materials were not marked in any fashion that would have lead Mr. Venti to assume that they were Mr. Bartlett's personal property. Even if Venti were to have believed they were Bartlett's property, they were not stored in such a fashion that Bartlett had any reasonable expectation of privacy under the totality of the circumstances presented here. Therefore, Venti's listening to the tapes and making their existence and the contents known to senior Department of Transportation staff did not violate any of Mr. Bartlett's constitutional rights in the Board's opinion.

This disciplinary proceeding falls within a civil rather than a law enforcement context. The Department of Transportation did not discover the recorder and tape recordings in the course of a search for evidence against Bartlett for criminal or civil proceedings. The Department of Transportation did not engage in any outrageous conduct in listening to the tapes after they were discovered. Consequently, the Board found the exclusionary rule would not apply. What was discovered need not be suppressed. The Board admitted the tape recordings, and transcripts thereof, and reviewed these on March 11, 1992.

According to the stipulations offered at the close of the hearing, Bartlett had been surreptitiously taping conversations without the consent of the interlocutors. The tape recordings were stored in an unmarked box in the work area, and Bartlett had taken no steps to mark the tapes or tape recordings as private property. The Board found that Bartlett's reliance upon a "reasonable expectation of privacy" was without merit.

On all the evidence, the Board found Bartlett's breach of professional conduct to be sufficiently serious to warrant his immediate discharge without warning pursuant to Per 308.03 (a)(2) of the Rules of the Division of Personnel. ¹ His conduct in surreptitiously taping conversations constituted an unacceptable deviation from the applicable work standard which the Board found to be sufficiently egregious to warrant his discharge without prior warning. The Department of Transportation acted within its discretion in deciding that Mr. Bartlett should be discharged. Given the nature of Mr. Bartlett's job and his years of professional experience in broadcast journalism, there is no excuse for his conduct.

1/ Per 308.03 (a)(2) Optional discharge. In cases such as, but not necessarily limited to the following, the seriousness of the violation may vary. Therefore, in some instances immediate discharge without warning may be warranted, while in other cases one written warning prior to discharge may be indicated. Repetition of any of the following offenses after one written warning has been given makes the discharge of the offender mandatory.

- a. Willful destruction of state property.
- b. Willful insubordination.
- d. Refusal to accept job assignments.
- d. Absence for a period of three consecutive working days without notification to his department unless adequate excuse is given.
- e. Willful falsification of claims for annual and/or sick leave.
- f. Inability to perform duty assignments due to being under the influence of drugs or alcohol.

The appellant raised several arguments for reinstatement based upon the Board's broad equitable powers, stating in part:

"If the evidence [related to the tape recordings] is allowable, Mr. Bartlett should be reinstated. Even if Mr. Bartlett did violate whatever bit of 'trust' that had not been destroyed by his fellow employees and superiors, his alleged actions should be seen as an understandable reaction to years of professional degradation and personal insult, thrown at Bartlett for very little, if any, justifiable reasons. The Board does not have to condone wanton taping of innocent fellow employees in giving Bartlett his job back. Bartlett, were he to receive his job back with all back pay and benefits, has nevertheless been severely punished. ■ If this termination is not overturned, the Board will be condoning the replacement of sound personnel management with personal attacks and a pack mentality."

(See: Appellant's Memorandum of Law, page 18)

The Board does not agree. Although the Board can not and will not condone the hopelessly sophomoric behavior which was exhibited by professional staff in the Information Office and tacitly approved by management from the Personnel Office to the Commissioners's Office, that behavior does not excuse Mr. Bartlett's conduct. (i.e., Memo, Morrison to Fletcher, Defendant's Exhibit 8). While the appellant introduced several possible defenses for his actions, he failed to follow any of them to a logical conclusion which would cause the Board to decide that he was wrongfully discharged from his employment.

On all the evidence, the Board voted unanimously to deny Mr. Bartlett's appeal.

APPELLANT'S REQUESTS FOR FINDINGS OF FACT

Pursuant to RSA 541-A:20 (supp):

"A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to his recognized representative."

The applicable provisions of the Board's administrative rules provide the following:

Per-A 204.04 Requests for Findings and Rulings.

- (a) At the close of the hearing, either party may submit request for findings of fact and rulings of law.
- (b) The Board may, for good cause shown, extend the time for submission of such requests.
- (c) Such requests shall not be unnecessarily numerous.

In addition to his Memorandum of Law, the Appellant submitted 79 proposed findings of fact. The Board found those requests to be unnecessarily numerous and declined to specifically rule on each. The same are granted to the extent consistent with the foregoing, and otherwise denied. The Board voted unanimously to deny the Appellant's proposed rulings of law, numbers 1 through 13 inclusive.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael C. Reynolds, SEA General Counsel
Karen Levchuk, Attorney, Transportation Bureau
John Scott, Human Resources Administrator, Dept. of Transportation

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APPEAL OF JAMES BARTLETT Docket #89-T-28

Order for More Specific Facts

January 11, 1990

At its meeting of January 10, 1990, the New Hampshire Personnel Appeals Board (McNicholas, Cushman and Johnson) reviewed the appeal of James Bartlett, a former employee of the New Hampshire Department of Transportation. In his October 19, 1989 letter of appeal, Appellant argues that the Department of Transportation violated his right to and reasonable expectation of privacy. He alleges that the Department of Transportation "went through Mr. Bartlett's stored personal effects" to obtain audio tapes which Mr. Bartlett allegedly made of conversations between himself and individuals at the Department of Transportation without telling those persons their conversations were being recorded.

On Appellant's behalf, SEA General Counsel Michael Reynolds requested that the Board:

1. Order the Department of Transportation "to provide a written explanation of all the facts and circumstances surrounding its obtaining the tapes";
2. rule on the pleadings if it agreed with Appellant that "the department had no right to obtain or listen to these tapes;
3. order that the existence of these tapes cannot be used as a basis of termination; and
4. order Mr. Bartlett reinstatedⁿ without hearing.

On December 22, 1989, Appellant filed with the Board a Motion for Temporary Orders, reiterating all the requests made in the initial appeal to the Board.

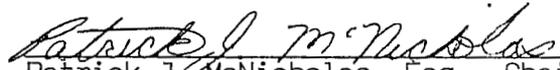
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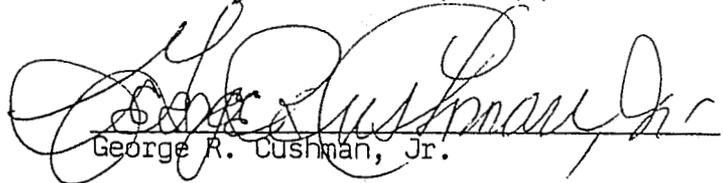
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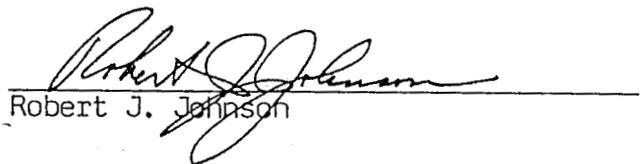
The Board hereby directs the Department of Transportation to provide a statement outlining how the Department came to be in possession of the tapes mentioned above. Such statement shall be forwarded to the Board and to Attorney Reynolds within ten calendar days of the date of this order.

The Board will hold the remainder of Appellant's requests in abeyance pending receipt of the appointing authority's statement.

THE PERSONNEL APPEALS BOARD


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