

State of New Hampshire



PERSONNEL APPEALS BOARD

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Concord, New Hampshire 03301
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APPEAL OF RICHARD BOLIN

Department of Transportation -Aeronautics Division

Docket #96-T-9

March 13, 1997

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met on Wednesday, January 24, and January 31, 1996, under the authority of RSA 21-I:58, to hear the appeal of Richard Bolin, a former employee of the Aeronautics Division of the Department of Transportation. Mr. Bolin, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his October 16, 1995, termination from employment as an Aviation Research Specialist. Kathryn Bradley, Assistant Attorney General, appeared on behalf of the Department of Transportation (hereinafter "the Department").

The following witnesses, who were sequestered at the request of the parties, were called to testify at the hearing.

Thomas F. Manning, Manager of the Bureau of Employee Relations
Fran Buczynski, Human Resources Administrator, DOT
Ronald Wanner, Chief of Operations and Administration, DOT Aeronautics Division
Joakim Karlsson, Chief of Airport Development
Richard Bolin, Appellant

The following exhibits were entered into evidence:

State's Exhibit 1 - July 5, 1995, letter from Fran Buczynski to Thomas Hardiman

State's Exhibit 2 - September 28, 1995, written warning (with attachments) to Richard Bolin from Joakim Karlsson for willful falsification of agency records, willful insubordination, and exhibiting uncooperative and disruptive behavior

State's Exhibit 3 - Overtime/Compensatory Time Reports submitted by Mr. Bolin for pay periods ending 1-19-95, 2-2-95, 3-16-95 and 4-27-95

States' Exhibit 4 - October 25, 1995, letter to Richard Bolin from Joakim Karlsson denying Appellant's request for informal settlement of the September 28, 1995, written warning

State's Exhibit 5 - October 16, 1995, Notice of Immediate Dismissal to Richard Bolin from Leon S. Kenison, Assistant Commissioner of Transportation

Appellant's A - October 12, 1995, letter from Richard Bolin to Joakim Karlsson requesting reconsideration and review of the written warning

Appellant's B - Correspondence dated October 6, 1995, from Richard Bolin to Joakim Karlsson, October 9, 1995, from Joakim Karlsson to Richard Bolin, and October 12, 1995, from Thomas F. Hardiman to Joakim Karlsson concerning Mr. Bolin's September 28, 1995, written warning

Appellant's C - notes generated by Joakim Karlsson concerning Mr. Bolin's September 28, 1995, written warning

Appellant's D - August 20, 1993, memorandum from Harold W. Buker to Richard D. Williams

Appellant's E - July 7, 1995, memorandum, with attachments, from Richard Bolin to Fran Buczynski concerning Compensation for Stand-by Time Worked

Appellant's F - July 17, 1995, memorandum from Richard Bolin to Joakim Karlsson

Mr. Reynolds argued that the Department began looking for a reason to fire Mr. Bolin after a series of incidents in which the appellant took issue with policies, procedures and management practices in the Aeronautics Division, and after the appellant informed the Department that he intended to press a claim for more than \$180,000 in back wages as compensation for "hours of availability" which the appellant considered to be "stand-by" hours. He asserted that the termination was retaliatory in nature, and that the evidence would demonstrate that because Mr. Bolin irritated his supervisors, the

Department would have seized upon any opportunity to charge the appellant with an offense which would support termination.

Mr. Reynolds argued that the appellant had never accepted his Department's interpretation of the Collective Bargaining Agreement or Fair Labor Standards Act with respect to appropriate compensation for period of time in which the appellant was scheduled to be available for immediate return to duty. He argued that the appellant believed that when he was carrying an agency-supplied beeper, unreasonable restrictions were placed on the use of his time, thereby qualifying him for "stand-by" pay in addition to the 10% salary enhancement received by employees like the appellant on the X208 salary scale. Mr. Reynolds argued that the Department's "Overtime/Compensatory Time Report" was the only form which the appellant could have reasonably used to document time when he was required by his employer to be available for immediate return to duty, and that the Department could not legally prohibit him from maintaining such documentation. He argued that Mr. Bolin's submission of such a report dated August 17, 1995, was neither an act of willful insubordination nor of falsification of agency records.

Mr. Reynolds argued that in order for the termination to be sustained, the Board would first have to uphold the written warning which the Department had issued to Mr. Bolin on September 28, 1995. He argued that when the appellant submitted requests for over-time or compensatory time payments, the appellant was merely documenting hours during which he believed he was entitled to "stand-by" compensation. He argued that these acts did not constitute willful falsification of agency records or willful insubordination, and therefore could not support the charges contained in the first written warning. He argued that in the absence of the valid first warning, the Department could not lawfully terminate the appellant's employment by issuance of a second warning for the same offense.

Ms. Bradley argued that the appellant had a history of disregarding and disobeying policies, rules and directives with which he disagreed. She argued that in spite of the agency's efforts to make Mr. Bolin aware of the rules, and the consequences of non-compliance with those rules, the appellant repeatedly ignored or disobeyed his supervisors' directives. Ms. Bradley argued that the appellant was directed not to submit requests for additional compensation unless he was actually called back

to work, and that his submission of "Overtime/Compensatory Time Reports" when the appellant was simply expected to be available for return to duty constituted a willful falsification of agency records. She argued that his persistence in submitting such reports after being directed not to do so constituted willful insubordination.

Ms. Bradley argued the Department acted reasonably in requiring the appellant to adhere strictly to his scheduled work hours so as not to be liable for payment of unauthorized overtime. She argued that the appellant violated those directives, and by doing so, engaged in willful insubordination. She argued that the evidence would demonstrate that on the night of October 11, 1995, the appellant was working in the Aeronautics Office, without his supervisors' knowledge or consent, thereby violating a direct order from his supervisors to adhere to his scheduled hours of work. She argued that when the appellant was ordered to leave, he refused. She argued that these acts constituted willful insubordination for which the appellant was subject to immediate termination, whether or not he had received prior warnings for the same offense.

FINDINGS OF FACT

1. At the time of his termination, Mr. Bolin was employed by the Aeronautics Division of the Department of Transportation as an Aviation Research Specialist.
2. In that classification, employees receive an additional 10% over their base pay as compensation for periods of "off-duty availability." Employees so classified are not entitled to additional over-time compensation unless they are actually required to report for duty during their off-duty hours.
3. By letter dated July 5, 1995, addressed to Thomas Hardiman, SEA Director of Field Operations and copied to Richard Bolin, in response to a request for a consultation under the terms of the Collective Bargaining Agreement, the Department advised the Association that Mr. Bolin was not entitled to additional compensation for periods of off-duty availability unless the appellant was actually required to report for duty.
4. By letter dated July 7, 1995, Mr. Bolin advised the Department that he had "decided to seek compensation for the time worked in 'standby' status for the period of July 1, 1993, through

June 15, 1995." Mr. Bolin asserted that any periods when he was expected to be available for return to duty were subject to substantial restrictions on the use of his time, and therefore must be compensated as "stand-by" hours. He asserted that he was entitled to an estimated \$180,335.61 in back wages.

5. On August 4, 1995, before placing Mr. Bolin's name on the schedule for availability for return to duty, Ron Wanner met with Mr. Bolin and informed him that he was not entitled to additional compensation unless he was required to report for duty. He instructed the appellant not to submit any requests for additional compensation.
6. Mr. Bolin submitted an "Overtime/Compensatory Time Report" dated 8-17-95 listing sixteen hours as "on-call for response" for the period of August 5, 1995, through August 8, 1995, listing the hours as "stand-by" status.
7. On September 28, 1995, Mr. Bolin received a written warning for willful falsification of agency records, willful insubordination and exhibiting uncooperative and disruptive behavior. The written warning advised Mr. Bolin that if the agency found him in violation for another incident of willful falsification of requests for payment of overtime, or another incident of willful insubordination could result in his immediate termination.
8. The September 28, 1995, warning instructed Mr. Bolin to "adhere to the office hours which [he had] proposed and [his supervisor] had approved," and that his repeated failure to adhere to approved hours of work was considered willful insubordination. The letter stated, in part, "You must adhere to your established work hours, unless otherwise approved by me, your immediate supervisor, or in my absence, the Chief of Operations and Administration."
9. At approximately 10:20 p.m. on the evening of October 11, 1995, the appellant's immediate supervisor, Joakim Karlsson was returning to Concord Airport from a meeting in Whitefield, New Hampshire. When he arrived at Concord Airport, he found Mr. Bolin working in the Aeronautics offices. The appellant had reference materials in use in the office and conference room, and he had set up a personal computer in the bathroom.
10. Mr. Bolin had not received approval from either Mr. Karlsson or Mr. Wanner to be in the Aeronautics office outside of regular office hours.
11. Mr. Karlsson directed Mr. Bolin to leave the offices, and he refused.

12. Mr. Bolin insisted that he needed to remain in order to have access to materials he intended to use in appealing his September 28th written warning. Mr. Bolin also insisted that because the computer he was using was located in the bathroom, space not specifically leased by the Aeronautics Division, he was working in a "public space" and could not be required to leave.
13. Mr. Bolin assured Mr. Karlsson that he was working on personal business and that the State had no liability for payment of overtime by allowing him to stay on the premises and use materials from the Aeronautics office.
14. Mr. Karlsson repeated his instructions for the appellant to leave the offices. He also told the appellant that he would not engage in discussion of what was or was not public space.
15. The appellant refused to leave.
16. On October 16, 1995, after having met with the appellant on October 13, 1995, to review the charges supporting the appellant's dismissal, Assistant Commissioner Kenison issued a notice of immediate dismissal to Mr. Bolin, charging him with willful insubordination and failure to take corrective action as required in the September 28, 1995, written warning.

RULINGS OF LAW

- A. Per 1001.08(b) of the Rules of the Division of Personnel provides that, "In cases such as, but not necessarily limited to, the following, the seriousness of the offense 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 warranted: (7) Willful insubordination."
- B. Per 1001.08(f) provides that no appointing authority shall dismiss a classified employee until the appointing authority meets with the employee to discuss the evidence supporting the dismissal, documents in writing the nature of the offense, and provides the employee an opportunity to refute the evidence of the offense.

DECISION AND ORDER

Under the provisions of the Collective Bargaining Agreement, Article VII, Section 8.1., "Law enforcement employees and non-standards workweek employees, in recognition of their off-duty availability, shall receive wages equal to the wages listed for their respective position... plus ten percent (10%)... The 10% ...additions to the wages are in lieu of any compensation for recall status and the parties agree that employees covered by this provision are expected to be available for return to duty during off-duty hours when notified of the expectation." (Emphasis added.)

Mr. Bolin's employers had explained the department's position that he was not entitled to stand-by pay, as defined by Article VIII of the contract, because the conditions for his availability for return to duty were not so restrictive as to prohibit him from using his own time effectively for his own purposes. Accordingly, he was instructed not to submit requests for over-time compensation or stand-by pay except when he was actually required to report back to duty. There is no evidence that the Department ever ordered Mr. Bolin not to keep a record of his "hours of off-duty availability."

In testimony before this Board, Mr. Bolin asserted that the August 17, 1995, *Overtime/Compensatory Time Report*" which he submitted was not, in fact, a request for payment of any kind. However, in his October 12, 1995, "Request for Reconsideration and Review" (Appellant's A) he stated, "This allegation is based on my August 17, 1995, *Overtime/Compensatory Time Report* in which I reported 16 hours of compensatory time earned during the weekend duty period from August 4 through August 7." He also wrote:

"I decided to record the hours worked while on-call and submit them to my supervisor for approval. Contrary to the allegation in the warning letter, I did not give you a 'request for payment of overtime or compensatory time.' According to Department policies, such requests would have to appear on the employee's time sheet, and would have to be paid at the next payroll opportunity. Mine was not a request for payment at all. I merely sought acknowledgment and confirmation of time worked. When I was researching my claim for back pay, I could not find any records that showed when I had come in early, stayed late, or

worked through the night. No official record is retained of this work, although such a record is clearly required by law. I found it impossible to calculate how much was due to me, because my own records were incomplete. Without official records of this time, worked, my rights to claim for back wages are damaged."

The appellant's insistence that he was entitled to more than \$180,000 for hours which were not "worked" but during which he was "available for return to duty" provides ample reason for the Department to insist that Mr. Bolin remain out of the work place during anything other than his regularly scheduled working hours. Mr. Bolin's own evidence (appellant's A) establishes that he had a clear understanding of that prohibition. By his own admission, Mr. Bolin was "reluctant" to enter the offices five or ten minutes before the start of his work day when his supervisor(s) were present. Clearly, the Department would be even less inclined to allow him to work in the office, using department-owned equipment and department-owned research materials, without any prior approval and without supervision, regardless of the appellant's claim to have been working on a "personal" matter.

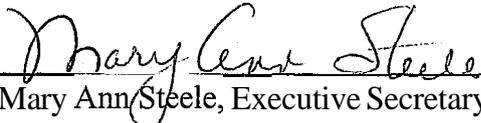
On the night of October 11, 1995, when Mr. Karlsson discovered Mr. Bolin working in the offices without prior approval, he reasonably directed the appellant to leave. The appellant not only refused, but attempted to engage Mr. Karlsson in a debate about whether or not the Department could require him to leave as long as he remained in the bathroom of the building, which was not subject to the department's lease. Mr. Karlsson refused to engage in the debate and again ordered the appellant to leave. The appellant refused.

The Board found the appellant's argument about "public" space versus "office" space to be without merit. The appellant entered the Aeronautics office outside of his regularly scheduled work hours and was using materials from both the office and conference room areas of the office. He was well aware of the prohibition against his being in the office outside of his regular schedule. When given the order to leave, the appellant refused. When directed a second time to leave, he again refused. Mr. Bolin knowingly and willfully violated his supervisors' orders, both by working in the Aeronautics office outside of his regularly scheduled work hours, and by refusing to leave when

directed to do so by his supervisor. As such, Mr. Bolin committed the offense of willful insubordination, for which he was subject to immediate dismissal.

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

FOR THE PERSONNEL APPEALS BOARD



Mary Ann Steele, Executive Secretary

cc: Virginia A. Lamberton, Director of Personnel
Michael Reynolds, SEA General Counsel
Kathryn Bradley, Assistant Attorney General