

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Edward A. Boulay

Docket #93 -D-10
Department of Postsecondary Technical Education

October 19, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met April 12, June 28, June 29 and August 9, 1995, under the authority of RSA 21-I:58, to hear Edward Boulay's appeal regarding his January 5, 1993, termination from employment as an Institute College Professor on charges of sexual harassment.¹ Mr. Boulay, was represented at the hearing by Attorney Shawn J. Sullivan. Assistant Attorney General William McCallum appeared on behalf of the Department of Postsecondary Technical Education.

The record in this matter consists of the audio tape recordings of the hearing on the merits, documents submitted by the parties prior to the hearing, exhibits entered into the record at the hearing on the merits, and requests for findings of fact and rulings of law submitted by the parties. The following exhibits were entered into the record:

- State's #1 - 12/14/92 Report from Joyce Blood on the "Investigation Results: Sexual Harassment Grievance - Edward A. Boulay, Jr., Professor, Biological Sciences"
- State's #2 - November 25, 1992 letter from Brenda Hall to Joyce Blood
- State's #3 - November 2, 1992 memo from Pam Langley to Chuck Annal re: Affirmative Action concerns
- State's #4 - November 2, 1992 memo from Pam Langley to Chuck Annal re: Meeting with students in BI-202-1
- State's #5 - December 18, 1992 letter and response to charges of sexual harassment from Edward Boulay to Joyce Blood
- State's #6 - Undated memo from Joyce Blood to NHTI President David Larrabee re: Sexual Harassment Investigation - Professor Edward Boulay
- State's #7 - January 5, 1993 letter of termination from David Larrabee and

¹ Originally, Mr. Boulay was suspended with pay, effective November 16, 1992, pending investigation into charges that he sexually harassed students and faculty at the New Hampshire Technical Institute. His paid suspension was continued on December 23, 1992. Mr. Boulay was discharged from employment effective January 5, 1993.

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Postsecondary Technical Education Commissioner Jeffrey Rafn to Edward Boulay

State's #8 - May 22, 1989 memo from Edward Boulay to NHTI Dean Arthur Harris re: Grievance Against Dr. Charles Annal

State's #9 - September 24, 1992 letter from Edward Boulay to Dean Arthur Harris

State's #10 - September 30, 1992 letter from Edward Boulay to Charles Annal

State's #11 - August 12, 1992 certification of receipt of State's policy on sexual harassment signed by Edward Boulay

State's #12 - Partial transcript - Deposition of Dr. Joyce Blood

State's #13 - Student Evaluation of Edward Boulay

Boulay A - NHTI Grievance Procedure

Boulay B - December 12, 1992 memorandum from Joyce Blood to David Larrabee re: Sexual Harassment Investigation - Edward Boulay

Boulay C - Performance Summary 8/91 to 5/92 of Edward Boulay completed and signed by David Bashaw and Chuck Annal

Boulay D - Performance Summary 8/18/92 to 11/12/92 of Edward Boulay completed and signed by Pamela Langley and Chuck Annal

Boulay E - April 19, 1993 letter to Dr. Larrabee from members of the NHTI Nursing Class of 1993

Boulay F - September 25, 1992 letter from Edward Boulay to Arthur Harris

Boulay G - May 15, 1993 letter from Margaret Castaldo to Pamela Langley

Boulay H - Photocopy of card postmarked November 17, 1992 to Edward Boulay from students

The following persons gave sworn testimony:

Joyce Blood
David Larrabee
Charles Annal
Pamela Langley
Edward Boulay
Cathy Richie
Hugh McGill
Pauline Dow
Herbert Sewade
Margaret Castaldo

STANDARD OF REVIEW

Per 1001.08 (b) Optional dismissal. In cases such as, but not necessarily limited to [those listed in Per 1001.08 (b)(1) - 16)], 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.

ARGUMENTS OFFERED BY THE PARTIES

Mr. McCallum argued that the appellant, Edward A. Boulay, was properly terminated under the Optional Dismissal provisions of the Rules of the Division of Personnel. He argued that Mr. Boulay had violated the State's policy on sexual harassment, a copy of which he received on August 12, 1992, and about which he had received training later that same month. Mr. McCallum argued that although Mr. Boulay admitted to the conduct for which he was dismissed, he did not believe that his conduct could be considered sexual harassment, because it lacked the element of quid pro quo. Mr. McCallum argued that Mr. Boulay continued to believe that the State's policy on sexual harassment was too global to be enforced, and that it was inapplicable to him because none of the alleged misconduct had a direct impact on students. Mr. McCallum argued that for more than a decade, Mr. Boulay had engaged in a course of conduct which was demeaning and degrading to female students and co-workers, and that having demonstrated an inability and/or an unwillingness to alter his behavior, Mr. Boulay either could not or would not take corrective action. Therefore, he argued that the State's only option was to terminate Mr. Boulay's employment and remove him from the classroom.

Mr. Sullivan argued that the investigation of Mr. Boulay's alleged harassment of students and faculty was conducted "behind the scenes" without any input from the appellant. He argued that most of the allegations came from Pam Langley, the appellant's supervisor, and that in an effort to build a case against the appellant, Ms. Langley had prompted other faculty members and students to make formal complaints about Mr. Boulay. Mr. Sullivan argued that Ms. Langley never provided proper warnings to the appellant or opportunities to take corrective action. Mr. Sullivan argued that the appellant had a 20 year record of employment with no warnings in his file, and that even the conduct to which Mr. Boulay had admitted was not so egregious as to warrant his termination from employment without prior warning. Mr. Sullivan argued that regardless of his client's alleged misconduct, the procedural violations committed by the State during the course of the suspension, investigation and termination were serious enough, in and of themselves, to warrant Mr. Boulay's reinstatement. He suggested that while reinstatement would be a "bitter pill" for the Institute, the State needed to learn that it could not violate the personnel rules with impunity.

DISCUSSION

This appeal is neither as clear-cut nor as simple as either of the parties would have the Board believe, and little that the parties have offered in their proposed findings of fact and rulings of law serve to clarify the issue. For instance, the appellant has asked the Board to find that the State committed such serious procedural violations when it failed to conduct a Title IX grievance investigation under the procedures outlined in his Exhibit A (New Hampshire Technical Institute Grievance Procedure), and when it drafted its notice of termination prior to its final meeting with Mr. Boulay, that the termination must be over-turned. The Board does not agree.

The policy admitted as "Boulay A" outlines the steps which students and faculty are required to use in filing a Title IX grievance. The procedure states, in part, "Any person who feels that he or she has been discriminated against by the Institute shall seek adjustment in the steps listed below." (Emphasis added.) None of the individuals complaining of Mr. Boulay's conduct asserted that they had been discriminated against by the Institute. On the other hand, the policy under which Mr. Boulay's conduct was investigated, the State of New Hampshire Policy on Sexual Harassment (admitted as part of State's Exhibit #1) states, in part, "Complaints of sexual harassment or of retaliation for making such complaints shall be accepted, either in writing or verbally, by the Director of the Division of Personnel. Complaints may also be accepted by a supervisor, who shall then refer the complaint to the Director. In either case, the Director of Personnel shall then assign a human resources representative from complainant's agency or from the Division of Personnel as investigator of the complaint. No employee shall be required to file a complaint with a supervisor who is hostile to that employee **and/or** who engages in conduct or has been alleged to have engaged in conduct which could be considered sexual harassment." While complaints of sexual harassment from co-workers or subordinates must be accepted under the State's Policy on Sexual Harassment, there is nothing clearly defining a student's right to have such a complaint against a teacher or professor investigated under the provisions contained therein.

It is clear that the appropriate method for investigating and resolving complaints of sexual harassment by faculty or employees of the New Hampshire Technical Institute would be to submit them to the Director of Personnel, and that complaints of discrimination by the Institute against any student or faculty member would be through the Title IX grievance procedure. Insofar as the complaints in this instance allegedly came from students through Mr. Boulay's supervisor, the Board believes that an investigation under the State's Policy on Sexual Harassment was a reasonable approach. The Board does not believe that the Institute's decision to utilize the State's policy rather than the Title IX Grievance Procedure was improper, or that the State's methodology for investigating the allegations entitles the appellant to any relief.

The Board is also not persuaded to over-turn the termination solely on the basis of the Institute's alleged violation of Per 1001.08 (f). Per 1001.08 (f) defines the steps which an appointing authority must take before dismissing an employee in the classified service. Those steps include the following:

- (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing the notice of dismissal;
- (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority;
- (3) documents in writing the nature and extent of the offense;
- (4) lists the evidence the appointing authority used in making the decision to dismiss the employee.

The rule clearly contemplates a series of events beginning with a preliminary decision by the appointing authority to dismiss the employee. The appointing authority is then expected to meet with the employee, to discuss the evidence supporting dismissal and to allow the employee to refute the evidence. Per 1001.08(g) then requires the appointing authority to "prepare a written notice of dismissal" which specifies the nature and extent of the offense, and apprise the employee of his/her rights to appeal the dismissal.

The Board believes that the rule was written to ensure that employees receive more than oral notice of dismissal and the reasons therefor. The Board does not believe that the rule prohibits the employer from drafting a notice of dismissal prior to meeting with the employee. The rule must be read in its entirety, and not so narrowly as to require the reversal of the decision simply because the notice of dismissal was prepared before the meeting.

Citing Silva v. U.N.H., USDC, Dist. of N.H., #Civ. 93-533-SD Order of September 15, 1994, the appellant also attempted to advance the argument that his classroom conduct and speech, although considered offensive by some, was actually protected by the First Amendment. Again, the Board does not agree. The facts in evidence do not support the theory that Mr. Boulay's conduct, including his gestures, his remarks, or his response to allegations of sexual harassment, is attributable to his own pedagogical style or preference. Rather, the Board believes that Mr. Boulay's conduct is a direct result of his inability, or unwillingness, to understand that times have changed, and of his supervisor(s) failure over the course of 20 years to confront him with those realities and require him to correct his behavior or face termination.

The State argued that it has an affirmative obligation to ensure that students and faculty can work and study in an atmosphere which is free of harassment and intimidation, and that the only way in which the State could meet its obligations in this instance was to terminate Mr. Boulay's employment. The State argued that the nature of Mr. Boulay's conduct was so egregious, and his willingness and ability to comprehend the seriousness of his offense was so limited, that dismissal was the only viable option in this instance. While the Board agrees that Mr. Boulay's conduct is completely unacceptable and that his understanding of the nature of harassment is seriously outdated, the Board does not believe that immediate termination without prior warning represented the Institute's only option.

The State's own witnesses, including Mr. Boulay's co-workers, his supervisor, the head of his academic division at the institution and the president of the college all asserted that as late as the Spring of 1992, Mr. Boulay had been "counselled" about his conduct. Chuck Annal, the Division Chair, testified that after receiving complaints from students in the spring of 1992 and hearing tapes of the appellant's interaction with students during a class, he and Academic Dean Arthur Harris discussed the problem and called Mr. Boulay into a meeting to discuss his interaction with students. Mr. Annal testified that Mr. Boulay described his conduct as a normal reaction to badgering by a student. Although Mr. Annal considered the appellant's conduct unacceptable, he took no formal disciplinary action, believing that a warning would be too "harsh". He also testified that during the meeting, Mr. Boulay "revisited" a warning he

had received in 1984² and told Mr. Harris and Mr. Annal that the warning had been so upsetting to him that he had entertained thoughts ranging from suicide to shooting Mr. Annal and his family. Although Mr. Annal testified that he told Mr. Boulay, "Ed, you just scared the shit out of me," the only remedial action suggested by either Mr. Annal or Mr. Harris was that the appellant should seek some counselling.

Although the Board agrees that the State has significant obligations to faculty, staff and students to maintain an environment that is free of any type of harassment or discrimination, the State also has an obligation to its employees to warn them clearly that certain conduct will result in disciplinary action which, in some cases, could result in termination from employment. None of the "counselling" which Mr. Boulay received ever included a warning that if he failed to modify his behavior, he would be dismissed. The facts in evidence demonstrate that whatever problems the Institute had with Mr. Boulay's performance or his behavior, it never apprised him that he must take immediate corrective action or face termination of his employment.

Ms. Langley, the appellant's immediate supervisor and head of his department at the Institute, testified that before she became Mr. Boulay's supervisor, she had been forced to tolerate his offensive conduct for more than a decade. When asked whether or not she had complained of that conduct, she admitted that she had not because she and the appellant were peers. However, she said that when she became his supervisor, she made him aware that certain of his behaviors would not be tolerated. The only instance which Ms. Langley related in which she directly reprimanded the appellant occurred when, in discussing one of his students, Mr. Boulay used hand gestures to demonstrate the breast size of the woman. Both Ms. Langley and Mr. Boulay testified that Ms. Langley gave him a direct order not to use such gestures in describing a student. Mr. Boulay's description of the incident itself, as contained in his December 18, 1992 response to Sexual Harassment Charge I-1, is not significantly different from Ms. Langley's testimony about the incident. The only notable difference is the manner in which these two individuals characterize the incident. Ms. Langley relates how offensive the comment was, and how typical it was of Mr. Boulay to make such a remark. Mr. Boulay claims that he used the gesture only because he could not recall the name of the young woman about whom he was inquiring, and that even if the gesture was offensive, which he did not believe it to be, it was not made in front of the student in question and therefore could not be considered sexual harassment.

The Board is particularly troubled by several aspects of this appeal. First, it is painfully apparent that Mr. Boulay and Ms. Langley have very little tolerance for one another, either

² While previously issued warnings may be reviewed as part of an employee's overall performance record, warnings are only effective as a basis for further discipline for a period of two years from the date they are issued. Although a warning issued in 1984 may be helpful in illustrating a course of conduct, the absence of additional warnings in the ensuing 8 years is equally telling.

personally or professionally. Ms. Langley's complaints about Mr. Boulay range from his alleged unwillingness to adapt to new curriculum developments or to stay abreast of changes in the field of microbiology, to his health and personal hygiene. The performance evaluation completed by Ms. Langley after she assumed supervisory responsibility for Mr. Boulay in the summer of 1992 provides an impressive amount of detail about Mr. Boulay's strengths and weaknesses as a professor. The evaluation dated 11/12/92, describes several incidents, and the dates on which they allegedly occurred. Although it appeared that Ms. Langley and others had this information long before the November 12, 1992 evaluation, neither Ms. Langley nor her own supervisors took any action to discipline Mr. Boulay.

"1) (9116192) In a discussion w/me about two particular students, Ed could only identify one student by the size of her breasts. Despite my verbal warning of the unacceptability of this description he persisted. I have informed Ed in the past (before I was Department Head) that descriptions of female students by breast size or leg shapeliness were offensive. Also, Dean Harris specifically warned Ed at the end of last semester that these behaviors could not continue." [Exhibit Boulay D]

Contrary to what appears in the performance evaluation, Ms. Langley testified that before assuming responsibilities as Mr. Boulay's supervisor, she was not in a position to criticize him when he made remarks or gestures which she found inappropriate or offensive, and therefore did not discuss the issue with him until she had actually reprimanded Mr. Boulay for his remarks during the meeting with him on or about September 16, 1992, which she cited in the performance evaluation. There is also no documentation of discussions between Dean Harris and the appellant, although Mr. Annal testified that he and Arthur Harris had cautioned Mr. Boulay about his conduct in the Spring of 1992.

"2) In a discussion with a campus visitor, Ed used vivid and explicit terms to explain to the visitor that promotions at the Tech were only obtained by females providing certain sexual favors to certain administrators. (8/27/92)" [Ib.]

According to Mr. Annal's testimony, Mr. Boulay told a fellow faculty member's husband that, "Women got promoted by going down on the President." However, the only criticism of Mr. Boulay's performance in the Performance Appraisal signed by Mr. Annal on May 25, 1992, concerned his tendency to fall behind in his syllabus, forcing him to rush through material toward the end of the semester. The evaluation states, in part, "This is when the students' complaints start." Otherwise, Mr. Boulay's performance was rated as meeting expectations. In the specific evaluation category "Communication," Mr. Bashaw and Mr. Annal rated Mr. Boulay as meeting expectations in each of the following sub-categories: "Speaks with the public and co-workers in a courteous and helpful manner," "When necessary expresses information in an appropriate fashion. As assigned, makes necessary oral and/or verbal presentations effectively." Although the appraisal form provides space for additional comments, none were made.

"3) (Late August '92) In another discussion about students, Ed suggested as a suitable 'correction' for a student's bad attitude 'kicking her pelvic region up between her shoulder blades.' This sort of comment is a typical expression of his ideas for corrective measures, whether it be for a student, an administrator, or a politician. Colleagues, myself included, are rarely able to respond, having been left bewildered by the bizarre nature of the statements." [Id.]

Again, if the above comment was "typical" of Mr. Boulay's manner of speaking, that conduct should have been reflected in the previous performance evaluation. If, as Ms. Langley testified and reported in the November, 1992, performance evaluation, Mr. Boulay's supervisors and colleagues rarely responded, it raises some serious doubt about how often the appellant was actually counselled about his behavior or manner of speech.

"Ed regularly comes to work in clothes that have a distinct odor. Most of his shirts have large, black circles under the arms - even the new ones purchased for him by Dean Harris at the start of this semester. Both faculty and students have complained about his appearance & odor over the past two academic years. Dean Harris has spoken with him on more than one occasion about his personal hygiene. I myself told him his new shirts must be washed after every wearing (8/21/92).

"On 9/1/92, I suggested to Ed that his shirt could use some ironing, and he replied, 'Fine - are you volunteering?' It has also been reported to me that in response to student comments about his appearance, he 'joked' that he 'didn't have a little woman at home' to take care of his laundry. Such remarks indicate to me that maintaining personal cleanliness is not a high priority for Ed." [Id.]

The performance appraisal signed by Mr. Bashaw and Mr. Annal on May 25, 1992, provides space to note whether or not the employee, "Maintains a personal appearance that is appropriate to the individual position's duties and responsibilities." The category was left unmarked on the evaluation, although clearly there were concerns about Mr. Boulay's personal appearance and hygiene, prompting Dean Harris to purchase new shirts for the appellant to wear.

Ms. Langley's assessment of Mr. Boulay's performance for the period of 8/18/92 to 11/12/92 concludes as follows:

"Ed has some serious problems that must be corrected immediately in order for him to be an effective teacher and colleague. He must become aware of the effect his inappropriate behaviors have on both students & colleagues. Students are either too polite or too intimidated to address him directly with their concerns. Colleagues simply wish to avoid conflict, and so, avoid confronting him with their own discomfort.

"Ed himself has indicated on numerous occasions that the new department structure and curriculum changes have been very stressful for him. He must get his personal life in

order so that his professional life (and that of his students and colleagues) does not continue to suffer. His sleep disorder has become particularly acute in recent weeks - severe enough to alarm students and make them seek assistance from the school nurse. Likewise, he has let his personal hygiene fall to offensive levels. These symptoms are suggestive of a medical disorder that needs immediate attention.

"Finally, the sexually oriented comments and the invasions of personal space must stop. While some behaviors are merely inappropriate, others plainly fall into the 'low recognition-high incidence' category of sexual harassment, as identified in the August '92 seminar for faculty. Although Ed identified himself to Dean Harris as an 'offender' immediately following the seminar, there has been no evidence that Ed has made any effort to stop these behaviors. Regular reminders, such as those provided by myself, Dave **Bashaw**, and Dean Harris should not be necessary now that all faculty have been informed of the types of behaviors that constitute harassment." [Id.]

First, there is little credible evidence of "regular reminders" from Ms. Langley, Mr. **Bashaw** or Dean Harris, or that such reminders, if given, apprised Mr. Boulay that his conduct constituted "low recognition/high incidence" harassment. There is also insufficient evidence concerning Mr. Boulay's alleged admission that he was "an offender" to warrant giving it the weight which the State suggests. In fact, Mr. Boulay's own response to the sexual harassment charges, and his assessment of the validity of the State's Policy on Sexual Harassment indicate that he has almost no understanding of how offensive his presence or his conduct could have been to his students and co-workers.

The Board can appreciate the students' reluctance to confront Mr. Boulay. The students were under no obligation to suggest or enforce corrective action on their professor's part. That responsibility belonged to the administration. Mr. Boulay's supervisors had an obligation to assess his performance, determine whether or not he was providing appropriate and adequate instruction and guidance to the students, assure that his interaction with faculty, staff and students was acceptable, and require him to take corrective action when he failed to meet work standards. Even if none of Mr. Boulay's conduct constituted sexual harassment, there is ample evidence that Mr. Boulay was not meeting the work standard for a full professor with 20 years of experience. The Technical Institute offered no reasonable explanation for failing to issue written warnings, the least severe form of discipline for correcting an employee's unsatisfactory work performance, when Mr. Boulay allegedly committed offenses ranging from coming to work in dirty or foul-smelling clothing or falling asleep in class, to making offensive remarks or gestures to co-workers and supervisors.

Early in their relationship as fellow faculty members, Ms. Langley considered Mr. Boulay's conduct offensive. When she became his supervisor, she had an opportunity to warn Mr. Boulay that his behavior, ranging from poor personal hygiene to interpersonal relationships which she considered inappropriate, bizarre, suggestive, sexist, or demeaning, would no longer be tolerated. The evidence reflects that with the exception of orally reprimanding Mr. Boulay

once for his identification of a student by breast size, Ms. Langley took no formal action to correct Mr. Boulay's behavior, or to apprise him that any further incident would result in discipline, up to and including his termination from employment. While there may be no excuse for Mr. Boulay's behavior, the Board must also consider the extent to which the agency's failure to exercise appropriate supervision and discipline contributed to Mr. Boulay's increasingly poor performance, and unacceptable conduct.³ The only evaluation which accurately reflected the appellant's performance deficiencies was administered shortly before his suspension, providing no meaningful opportunity for the appellant to take corrective action.

Having considered the testimony, evidence and arguments offered by the parties, the Board ruled on the Proposed Findings of Fact and Rulings of Law as follows:

STATE'S PROPOSED FINDINGS OF FACT:

1 - 3, 8, 11, 12, 17, 19 - 25, and 28 - 33 are granted.

4 - 6, 10, 13 - 16, 18 and 27 are denied.

7 is granted in part. The significance and sincerity of the threat is disputed, even by Mr. Annal.

26 is granted in part, as it is generally true to the evidence.

STATE'S PROPOSED RULINGS OF LAW:

All of the State's proposed rulings of law, except for #7, are granted. #7 is denied.

APPELLANT'S PROPOSED RULINGS OF LAW:

1, 2 - 9, and 11 are granted.

3 is denied, as set forth above.

10 is granted in part. The Rules specifically provide for immediate termination without prior warning for certain types of offenses.

The evidence clearly reflects that Mr. Boulay's conduct constituted sexual harassment. But for the absence of documentation and evidence of supervisory intervention during the several years preceding his termination, the Board believes that the termination would have been supportable. However, the evidence also reflects that in spite of the administration's

³ Although the Investigator, Joyce Blood, concluded that Mr. Boulay had violated the State's Policy on Sexual Harassment, the only first-hand evidence of conduct which might have been considered harassment came from Pamela Langley, the appellant's immediate supervisor. None of those persons who allegedly considered themselves to have been victims of sexual harassment testified at the hearing. Ms. Dow, who was listed in the investigative documents as one of the witnesses, testified that she did not consider Mr. Boulay's behavior to be harassment. While the Board has no reason to doubt the Investigator's credibility, without hearing the complaints first-hand, particularly when the Investigator had such difficulty recalling details of her interviews and meetings, the Investigator's report must be treated as vague, hearsay evidence.

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continuing concerns spanning more than a decade, it took no action to apprise this long term employee that unless his conduct was corrected, his continued employment was in jeopardy. For that reason, the Board does not believe immediate termination without prior warning was the appropriate course of action.

While the Board is mindful of Mr. Boulay's rights and the agency's responsibilities under the provisions of the Rules of the Division of Personnel, the Board is also aware that at least on paper, Mr. Boulay enjoyed a relatively unblemished record of employment for nearly twenty years. Nonetheless, the nature of Mr. Boulay's conduct is sufficiently repugnant that neither the faculty nor the students should continue to be subjected to it. The evidence makes it clear that what Mr. Boulay considers appropriate conduct is absolutely inconsistent with morally and legally acceptable standards for the modern workplace.

Simply returning Mr. Boulay to the Technical Institute with a lesser discipline would serve no purpose but to punish the Technical Institute's administration for failing to warn the appellant in writing that continued misconduct would subject him to discipline, up to and including termination from employment. Furthermore, simple reinstatement, even with a lesser discipline, would appear to minimize the seriousness of Mr. Boulay's offense.

Therefore, in consideration of the testimony and evidence offered by the parties, the Board voted to grant Mr. Boulay's appeal in part, ordering him reinstated, but to inactive status. The record reflects that in the Spring of 1993, Mr. Boulay had requested from Dr. Larrabee a medical leave of absence, asserting that he suffers from "psychological amnesia". That request was denied.

In her evaluation of Mr. Boulay on November 12, 1992, Ms. Langley stated:

"Ed himself has indicated on numerous occasions that the new department structure and curriculum changes have been very stressful for him. He must get his personal life in order so that his professional life (and that of his students and colleagues) does not continue to suffer. His sleep disorder has become particularly acute in recent weeks - severe enough to alarm students and make them seek assistance from the school nurse. Likewise, he has let his personal hygiene fall to offensive levels. These symptoms are suggestive of a medical disorder that needs immediate attention."

Without making any finding with regard to the validity of the appellant's claim, or the cause of Mr. Boulay's alleged malady, the Board determined the interests of both parties will be best served by converting Mr. Boulay's termination to an indefinite, unpaid leave of absence, from which he may elect to retire from State service, or from which he may return to active status under the following conditions:

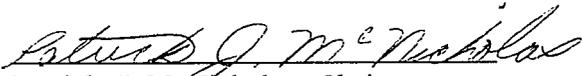
1. Mr. Boulay shall demonstrate that he has received, or is receiving, appropriate medical treatment for his sleep disorder, and he shall provide an assessment from his treating

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physician(s) certifying that he is physically able to return to full time employment and perform all the required duties and responsibilities of his position.

2. Mr. Boulay shall complete a course of remedial training on the subject of recognizing and preventing sexual harassment which is approved by the agency, and the cost of attending such training, shall be borne by the agency.
3. This decision shall serve as a warning under the Optional Dismissal provisions of the Rules of the Division of Personnel. Any further, documented instance of sexual harassment on Mr. Boulay's part shall be grounds for his immediate dismissal under Per 1001.08 of the Rules of the Division of Personnel.

THE PERSONNEL APPEALS


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
William McCallum, Esq., Department of Justice
Shawn J. Sullivan, Esq., Cook and Molan, P.A.

State of New Hampshire



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

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Docket #93 -D-10
Department of Postsecondary Technical Education

Order on Motions for Rehearing and/or Reconsideration of the Board's October 19, 1995 Decision

January 9, 1996

On November 7, 1995, the Board received the Appellant's Motion for Rehearing, filed by Attorney Sullivan on behalf of Edward Boulay. The State's Motion for Rehearing, filed by Attorney McCallum, was received by the Board on November 15, 1995, and the Appellant's Objection to that Motion was received on November 22, 1995.

The Appellant offered the following grounds for his assertion that the Board's decision was unreasonable and unlawful:

- "1. The discipline against Boulay is invalid because the appointing authority based its decision on conduct occurring more than two years prior to the date of termination.
- "2. The discipline is invalid because the appointing authority did not provide Boulay with a proper pre-termination hearing.
- "3. The appointing authority failed to comply with the sexual harassment investigation policy.
- "4. The evidence of sexual harassment is insufficient to support the discipline of Boulay.
- "5. The board's findings ... do not support a ruling of sexual harassment and a hostile environment."

The State asserted that the decision reinstating the Appellant to a faculty position despite findings by the Personnel Appeals Board of sexual harassment is based on an incorrect legal premise, and is unjust.

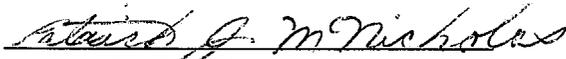
After carefully reviewing both motions in light of its decision in the above-titled appeal, the

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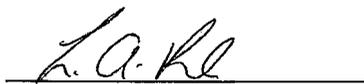
Board voted to deny both the Appellant's and the State's Motions for Rehearing. In so doing, the Board voted to affirm its decision to conditionally reinstate Mr. Boulay without benefit of back-pay, provided that he fully satisfies the conditions set forth in the Board's Decision of October 19, 1995, as follows:

1. Mr. Boulay shall demonstrate that he has received, or is receiving, appropriate medical treatment for his sleep disorder, and he shall provide an assessment from his treating physician(s) certifying that he is physically able to return to full time employment and perform all the required duties and responsibilities of his position.
2. Mr. Boulay shall complete a course of remedial training on the subject of recognizing and preventing sexual harassment which is approved by the agency, and the cost of attending such training, shall be borne by the agency.
3. This decision shall serve as a warning under the Optional Dismissal provisions of the Rules of the Division of Personnel. Any further, documented instance of sexual harassment on Mr. Boulay's part shall be grounds for his immediate dismissal under Per 1001.08 of the Rules of the Division of Personnel.

THE PERSONNEL APPEALS


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
William McCallum, Esq., Department of Justice
Shawn J. Sullivan, Esq., Cook and Molan, P.A.

State of New Hampshire



PERSONNEL APPEALS BOARD

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

Appeal of Edward A. Boulay

Supreme Court Case No. 96-085 (Remanded)

April 6, 1998

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Wood) met on Wednesday, April 1, 1998, under the authority of RSA 21-I:58, to review correspondence received from the parties in response to the New Hampshire Supreme Court's March 5, 1998, decision in the Appeal of Edward A. Boulay, (No. 96-085). In its decision, the Court remanded the appeal to the Board for a determination of back-pay. By letter dated March 11, 1998, Attorney Shawn Sullivan requested that the Board schedule a hearing on both the compensation issue and the appellant's pending Motion for Contempt.

By letter dated March 20, 1998, Assistant Attorney General Jennifer Gavalondo informed the Board that she and Attorney Sullivan had discussed the appeal, that they agreed that the backpay issue could be resolved without the need for a hearing, and that they agreed that the pending motion for contempt was moot in light of the Court's order. She indicated that the parties intended to submit a stipulation to the Board in June, noting, however, that both parties wished to reserve the right to a hearing should one become necessary.

In consideration of the parties' requests, the Board voted to defer scheduling the matter for hearing so that the parties might have sufficient time to develop a suitable stipulation. However, in order to avoid the possibility that the matter will be further delayed in the

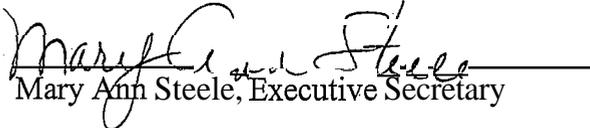
event that the parties are unable to reach an agreement, the Board has scheduled a prehearing/status conference as follows:

July 1, 1998 - 9:00 a.m.

Room 411, State House Annex
25 Capitol St., Concord, NH 03301

Motions to postpone or reschedule this conference must be made in writing and be received by the Board within 15 calendar days of the date of this order to be considered. Untimely requests will be denied, except for good cause shown

FOR THE PERSONNEL APPEALS BOARD


Mary Ann Steele, Executive Secretary

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jennifer Brooks Gavilondo, Assistant Attorney General, Dept. of Justice, 33
Capitol St., Concord, NH 03301-6397
Attorney Shawn J. Sullivan, Cook and Molan P.A., 100 Hall St., PO Box 1465,
Concord, NH 03302-1465

State of New Hampshire



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Appeal of Edward A. Boulay
NH Supreme Court Case No. 96-085 (Remanded)
NHTI, Regional Community Technical College System

October 28, 1998

The New Hampshire Personnel Appeals Board (Bennett, Rule and Johnson) met on Wednesday, August 5, 1998, to hear argument by the parties to the above-captioned appeal concerning the appellant's entitlement to compensation and benefits as a result of his reinstatement with the New Hampshire Technical Institute. Attorney Jennifer Brooks Gavilondo, Assistant Attorney General, appeared for the State. Attorney Shawn Sullivan, appeared for the appellant.

By order dated March 5, 1998, the New Hampshire Supreme Court issued its decision in the above-captioned appeal. It stated, in part, "While we agree with the board's decision to reinstate the petitioner, we conclude on the record before us that NHTI violated Per 1001.08(f) [when it terminated the appellant]. Because NHTI violated this administrative rule, the petitioner is also entitled to back pay and benefits pursuant to RSA 21-I:58. Accordingly, we remand for a determination of back pay and benefits. Affirmed in part; reversed in part; remanded."

Mr. Sullivan explained that the Appellant and the State had reached agreement on several issues, including reimbursement for premiums paid by the appellant for dental insurance

Appeal of Edward A. Boulay
NH Supreme Court Case No. 96-085 (remanded)

following his termination. He indicated that the State and the appellant also had reached agreement on restoration of contributions to the N. H. Retirement System. However, he stated, they had been unable to agree on how to define the "period" of denied compensation, and the amount of bonus leave to which the appellant would be entitled upon reinstatement.

Mr. Sullivan argued that while employed by New Hampshire Technical Institute, Mr. Boulay had been a 180-day/year academic employee, and had never been required to work the traditional 260-day/year schedule required of most State employees. Therefore, he argued, the "period of denied compensation" must be limited to the 180 days the appellant ordinarily would have worked. He asked the Board to find that Mr. Boulay's interim earnings credited against the back-pay award should be reduced to 69.5% of actual earnings. Ms. Gavilondo argued that RSA 21-I:58 provides for a reduction in the back pay award upon reinstatement by "any amount of compensation earned or benefits received from any other source during the period" of termination. She argued that the statute "...does not distinguish between hours or days worked while in state service and while out of state service." Therefore, she asked the Board to find that all earnings for the period of separation be credited against the award of back pay.

RSA 21-I:58, I states, in pertinent part, "The employee shall be reinstated without loss of pay, provided that the sum shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. 'Any other source' shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period..."

The Board agrees with the State, that the "period of denied compensation" runs from the date of termination to the date of reinstatement. Under the appellant's analysis of the law, the only earnings an appointing authority could use to offset an award of back-pay

would be the amount earned during hours that would have been in conflict with the appellant's regular work schedule prior to termination. Clearly, that was not the legislature's intention. Otherwise, the law would make no provision for reduction in a back pay award by additional part-time earnings when "...the number of hours worked in such casual employment increases during the period..." Insofar as none of the reported earnings used to offset the back-pay award were obtained through "continued casual employment," the Board voted to deny the appellant's request for proration of the salary off-set.

Mr. Sullivan argued that as a full-time employee, Mr. Boulay would have been entitled to earn, and use, up to 30 hours of fiscal year bonus leave during each fiscal year of the period of denied compensation. He argued that where the contract language contains a "use it or lose it" provision for fiscal year bonus leave, and the appellant had no opportunity to use the leave, he should not lose it. Mr. Sullivan asked the Board to find that the appellant would have earned and used three 10-hour days of bonus leave per year, and therefore should have a total of 180 hours of fiscal year bonus leave credited to him upon reinstatement.

Ms. Gavilondo argued that it would be impossible to determine how much sick leave the appellant might have used in any given year, and therefore it would be equally impossible to determine the amount of bonus leave to which the appellant might have been entitled. She also argued that under the provisions of the Collective Bargaining Agreement, an employee may not accrue more than 30 hours of bonus leave in any fiscal year, and that any such leave that is not used before the end of the fiscal year shall lapse. She indicated, however, that the Technical Institute was willing to restore 900 hours of sick leave to the appellant, and to credit him with 30 hours of bonus leave that will be available for his use during Fiscal Year 1999.

While the Board agrees that Mr. Boulay should not suffer a loss of 30 hours of fiscal year bonus leave for each fiscal year of denied compensation, the Board does not agree that

the appellant should be permitted to carry a balance of leave exceeding the maximums permitted by the ~~Collective Bargaining Agreement~~. However, before FY 95, there was no limit on the amount of bonus leave an employee was permitted to accrue.

According to Article 11.1.1 of the 1997-1999 Collective Bargaining Agreement, "Effective July 1, 1995, earned bonus leave must be used during the fiscal year following the fiscal year in which it was earned or it shall lapse." Mr. Boulay was dismissed from State service effective January 5, 1993. Had the appellant remained an active employee, he would have been entitled to earn up to 30 hours of bonus leave for each of the fiscal years of FY 93 (July 1, 1992 through June 30, 1993), FY 94 (July 1, 1993 through June 30, 1994), and FY 95 (July 1, 1994 through June 30, 1995). Those 90 hours of leave would not have been subject to the provisions of Article 11.1.1, and would not have lapsed. In each succeeding fiscal year (FY 96, FY 97 and FY 98), any unused fiscal year bonus leave earned by the appellant would have lapsed. Therefore, the Board found that the appellant is entitled to a credit of 90 hours of bonus leave for fiscal years '93, '94 and '95 that is not subject to the provisions of Article 11.1.1. of the Collective Bargaining Agreement. The appellant also shall be entitled to 30 hours of fiscal year bonus leave that is subject to the conditions of Article 11.1.1., and must be used prior to July 1, 1999. The appellant's request for an additional credit of 60 hours of bonus leave for Fiscal Years '96 and '97 is granted in part and denied in part. Insofar as Article 11.1.1. of the Collective Bargaining Agreement prohibits employees from accruing fiscal year bonus leave in excess of 30 hours, ordering 60 hours of bonus leave credited to the appellant would constitute a violation of Article 11.1.1. of the Agreement. Therefore, the Board voted to order the appellant paid for that leave in addition to his payment of lost income and benefits as set forth above.

Per the agreement of the parties, the Technical Institute also will make payment to Mr. Boulay in the amount of \$1160.61 for dental insurance premiums paid by him following his separation from service.

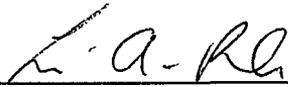
THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

cc: Virginia A. Lamberton, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jennifer Brooks Gavilondo, Assistant Attorney General, 33 Capitol St., Concord,
NH 03301
Atty. Shawn Sullivan, Cook and Molan, P.A., 100 Hall St., PO Box 1465,
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Appeal of Edward A. Boulay
NH Supreme Court Case No. 96-085 (Remanded)
NHTI, Regional Community Technical College System

December 7, 1998

By letter dated November 19, 1998, Attorney Shawn Sullivan filed Appellant's Motion for Rehearing/Reconsideration of the Board's October 28, 1998, decision in the above-captioned appeal. The State's Objection to that Motion, submitted by Assistant Attorney General Jennifer Gavilondo, was received by the Board on November 23, 1998.

In support of the State's Objection, Ms. Gavilondo argued that the Motion for Rehearing/Reconsideration was not timely filed in accordance with the Board's Rule Per-A 204.06. While Ms. Gavilondo is correct in her assertion that the Motion was not timely filed in accordance with the Board's published rules, amendments to RSA 541:3 since those rules were published expanded the time within which an appellant could request rehearing. Insofar as Mr. Sullivan's motion was received by the Board within 30 days of the date of the Board's decision, the Board considers his motion timely filed.

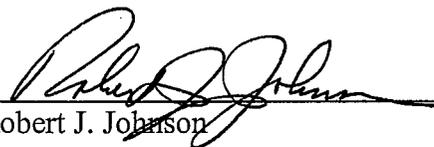
Ms. Gavilondo also argued that to the extent the Board entertained Mr. Boulay's motion, it should be denied, as the appellant merely reiterated his arguments made before the Board at the August 5, 1998, hearing. Ms. Gavilondo argued that the Board's October 28, 1998, decision was consistent with the plain language of RSA 21-I:58, and that the Board had correctly determined how to offset Mr. Boulay's backpay award upon his reinstatement. The Board agrees.

Each of the arguments raised by the appellant in his Motion were raised at the hearing and carefully considered by the Board in reaching its decision. The appellant offered no new evidence or argument to persuade the Board that its October 28, 1998, decision was unlawful or unreasonable. Accordingly, the Board voted unanimously to deny that motion and affirm its decision of October 28, 1998.

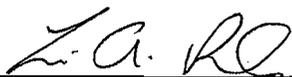
THE PERSONNEL APPEALS BOARD



Mark J. Bennett



Robert J. Johnson



Lisa A. Rule

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03302-1465

The State of New Hampshire

Supreme Court

No. **99-011** *Appeal of Edward A. Boulav, Jr.*

TO THE CLERK OF NH PERSONNEL APPEALS BOARD

I hereby certify that the Supreme Court has issued the following order in the above-entitled action:

June 25, 1999. The court having reviewed the appeal, the decision below is summarily affirmed in accordance with Rule 25(1)(c) on the basis that the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable.

July 16, 1999

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

RECEIVED
JUL 16 1999
NH PERSONNEL BOARD

OK

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 99-011, Appeal of Edward A. Boulay, Jr., the court upon June 25, 1999, made the following order:

The court having reviewed the appeal, the decision below is summarily affirmed in accordance with Rule 25(1)(c) on the basis that the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable.

Distribution:

NH Personnel Appeals Board
Shawn J. Sullivan, Esquire
Jennifer Brooks Gavilondo, Esquire
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk