

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
25 Capitol Street  
Concord, New Hampshire 03301  
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## ***APPEAL OF MAXIE BREAux***

***Docket #01-T-2***

***Department of Youth Development Services***

***February 21, 2001***

The New Hampshire Personnel Appeals Board (Wood, Johnson and Barry) met on Wednesday, January 10, 2001, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the Code of Administrative Rules, to hear the appeal of Maxie Breaux, a former probationary employee of the Department of Youth Development Services. Mr. Breaux, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his July 6, 2000 termination from employment as a Youth Counselor I for allegedly failing to meet the work standard. Fran DeCunto, Human Resources Administrator for the Department of Youth Development Services, appeared on behalf of the State.

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

### State's Exhibits

- A. Performance Evaluation for Maxie Breaux dated 7/99 to 1/1/00
- B. Employment Application and Resume submitted by Maxie Breaux for Youth Counselor position
- C. Letter from Anthony Camelo to Maxie Breaux dated 12/11/99
- D. Letter from Anthony Camelo to Maxie Breaux dated 12/11/00

- E. Letter of Concern dated 4/21/00 issued to Maxie Breaux
- F. Performance Evaluation for Maxie Breaux dated 7/99 to 5/00
- G. Termination letter dated July 6, 2000 from Commissioner Peter Favreau to Maxie Breaux

Appellant's Exhibits

The appellant submitted no additional exhibits.

The following persons gave sworn testimony:

- Wayne Eigabroadt, Training Coordinator and Acting Ombudsman
- Milton Tobey, Jr., Operations Officer I
- Michael McGeehan, House Leader
- Lamont Hicks, Assistant House Leader
- Maxie Breaux, appellant

The State alleged that Mr. Breaux received below expectation ratings on his performance evaluations in several categories including job knowledge, communications, dependability, cooperation and safety. Moreover, the State alleged that Mr. Breaux committed a serious breach of security during an incident on May 14, 2000, when he allowed three residents to enter an unsecured area without implementing required security procedures. The appellant asserted that he was meeting the work standard, and that his termination from employment was "arbitrary, capricious, illegal and/or made in bad faith." Specifically, the appellant alleged that the real basis for Mr. Breaux's termination was retaliation for his "outspokenness in raising job concerns to the management and personality issues not appropriately of management concern or involving the work standard," and for his refusal "to provide information against a fellow employee which the appointing authority incorrectly believed Mr. Breaux had" (Letter from Michael Reynolds to the Personnel Appeals Board dated August 2, 2000).

Having considered the evidence and arguments offered by the parties, the Board made the following findings of fact and rulings of law:

### Findings of Fact

1. Mr. Breaux was hired as a full-time temporary Youth Counselor 1 on July 2, 1999, at which time he was assigned to work at the Youth Development Center.
2. On October 5, 1999, Mr. Breaux applied for and received approval to transfer to a position of Youth Counselor I at the Youth Services Detention Unit in Concord.
3. When Mr. Breaux transferred positions, he began a new initial probationary period.
4. Although Mr. Breaux's 6 month probationary performance review shows him as meeting expectations overall, the evaluation lists his performance as "below expectations" in one or more categories under the following general headings: Quality of Work, Quantity of Work, Job Knowledge, Dependability, and Cooperation.
5. Shortly before the 6-month probationary evaluation, Mr. Breaux was notified that he was deficient in meeting the training requirements for his position and needed to complete training in defensive driving, first aid, psychotropic drugs, fire safety, report writing, handcuffing and transporting, and diversity in the workplace..
6. On December 10, 1999, House Leader Thomas McGeehan issued a "Letter of Attention" to Mr. Breaux memorializing a discussion between him and the appellant on December 9, 1999 regarding deficiencies involving the appellant's conduct following a pat search of one of the residents.
7. On February 11, 2000, Anthony Camelo, a Youth Counselor II, issued a memorandum of individual supervision to Mr. Breaux, highlighting areas of the appellant's work that needed improvement.
8. On May 25, 2000, Mr. Breaux signed a letter of concern issued to him by Assistant House Leader Lamont Hicls, dated May 19, 2000. In that letter, Mr. Hicls cited specific concerns with the appellant challenging supervisory authority in front of the residents and using profanity in front of the residents.
9. Mr. Breaux admitted that he used foul language in front of the residents, and that he had been counseled about it by his supervisors, but he believed that his language was no worse than that of other staff.
10. On June 8, 2000, Mr. Breaux received his 10-month performance evaluation. Although Mr. Breaux's review shows him as meeting expectations overall, the evaluation lists his

performance as "below expectations" in one or more categories under the following general headings: Job Knowledge, Communications, Dependability, Cooperation, and Safety.

11. In the "General Comments by Supervisor" appearing on the 10-month probationary evaluation, his immediate supervisor wrote, "Overall Max B. has barely met the department's expectations. Max B. needs a lot of fine tuning of his skills to become a productive employee of this department. Max is currently on Probation. His status on becoming permanent is in question at this time as out of the (9) categories Max has [sic] 5 negatives in which he needs to improve in."
12. Security precautions in effect at the institution require residents to be handcuffed when they are moved from a secure area to an unsecured area.
13. On May 14, 2000, in preparation for a picnic for residents of the Detention Unit, Mr. Breaux took three residents with him outside of the building into an unsecured area in order to move a picnic table. None of the residents was handcuffed.
14. The incident represented a breach in security procedures and created the risk that one or more of the residents might have escaped.
15. When questioned about the incident, Mr. Breaux indicated that he did not believe the residents would have escaped because of the kind of relationship he had with them.
16. Mr. McGeehan, the House Leader for Mr. Breaux's unit, characterized Mr. Breaux's excuse for the security breach as "optimistic and naïve."
17. Mr. Breaux met with Commissioner Favreau on July 6, 2000, to review the charges contained in the letter of termination and to discuss the reasons supporting his dismissal from employment.
18. Mr. Breaux was dismissed from his employment on July 6, 2000, for continued failure to meet the work standard, particularly with respect to the security breach that occurred on May 14, 2000.

#### Rulings of Law

- A. "'Probationary period' means a period of full-time work during which a full-time employee is required to demonstrate satisfactory performance of the duties and responsibilities of the

employee's position as listed on the supplemental job description for the position." [Per 102.421

- B. "At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not: (1) Arbitrary; (2) Illegal; (3) Capricious; or (4) Made in bad faith." [Per 1001.02 (a)]
- C. "No appointing authority shall dismiss a probationary employee under this rule until the appointing authority meets with the employee, prior to issuing the notice of dismissal, to discuss the appointing authority's reason(s) supporting the decision to dismiss the employee." [Per 1001.02(b)]
- D. "If an appointing authority determines that there are sufficient grounds to dismiss the probationary employee, the appointing authority shall: (1) Prepare a written notice of dismissal to be given to the probationary employee specifying the reason(s) for dismissal; and (2) Notify the employee in writing that the employee may appeal the dismissal within 15 calendar days of the notice of dismissal to the board if the employee can allege facts sufficient on their face to support an allegation that the dismissal was: a. Arbitrary; b. Illegal; c. Capricious; or d. Made in bad faith." [Per 1001.02 (c)]
- E. Standard of Review. In probationary termination appeals, the board shall determine if the appellant proves by a preponderance of the evidence that the termination was arbitrary, illegal, capricious or made in bad faith. Allegations that the appellant does not know the reason(s) for the dismissal, or evidence that the appointing authority took no formal disciplinary action to correct the employee's unsatisfactory performance or failure to meet the work standard prior to dismissing the employee, shall not be deemed sufficient to warrant the appellant's reinstatement." [Per-A 207.12 (a)]

During the hearing, Mr. Breaux testified, "I think I was terminated because I think Mr. Hicls had an incident and he sued the company for discrimination...they were looking to terminate somebody that day and since they couldn't get to Lamont they were going to get to me." Mr. Reynolds argued that the agency's real motive for terminating Mr. Breaux's employment was anger over his failure to provide information about another employee who was under investigation for a separate incident. Mr. Reynolds argued that the appellant's performance

evaluations showed that although Mr. Breaux was barely meeting the work standard, he was indeed meeting the standard. He argued that although Mr. Breaux had been counseled about using foul language in the presence of students, his conduct was certainly no worse than that of his co-workers. He also argued that while there was an admitted breach in security when Mr. Breaux took students out of a secure area without employing the appropriate safety measures, the agency had failed to produce evidence that Mr. Breaux's supervisors had made him aware of the security procedures, or that his conduct was any more egregious than that of his supervisors who failed to properly document the incident when it occurred. Mr. Reynolds argued that in terminating Mr. Breaux, the agency applied a shifting standard that should have applied equally to permanent employees.

Ms. DeCunto argued that the Hicks investigation was unrelated to Mr. Breaux's termination. Ms. DeCunto argued that Mr. Breaux was a probationary employee who had received two evaluations that were, at best, mediocre. In addition to those reviews, the appellant had received counseling letters about his performance and notices that he was deficient in completing the required training. Finally, Ms. DeCunto argued, the appellant was involved in a serious breach of security that could have put himself, the students, and the community at large at considerable risk. She argued that the appellant failed to meet the work standard, that he was counseled about training and performance deficiencies, and that ultimately the State applied the provisions of Per 1001.02 of the Rules of the Division of Personnel in dismissing Mr. Breaux from his employment as a probationary employee.

### Decision and Order

The Board found no credible evidence that Mr. Breaux's termination was effected in any part as a result of his role in the investigation of another staff member. The evidence reflects that Mr. Breaux had been evaluated and counseled regularly with respect to the agency's expectations. Although the appellant argues that his performance in these areas was no worse than that of some co-workers, the Board found that to be an insufficient reason to justify his reinstatement. Performance should not be measured in terms of the lowest common denominator. The agency

provided a reasonable standard against which to measure Mr. Breaux's performance, and he failed to achieve that standard.

Although Mr. Breaux's performance evaluations indicated that he was barely meeting the standards for satisfactory performance, there were a number of problems brought to his attention that needed to be corrected in order for him to attain status as a permanent employee. They included such issues as failure to complete necessary training, demeanor with the residents, use of improper language with residents, and issues of safety and security. Mr. Breaux was advised repeatedly that he needed to complete certain training essential to the performance of his duties. The agency's expectations were not unreasonable, and they provided ample notice of the training to be completed. Although the appellant indicated that he was unable to attend training because of asthma and a wrist injury, the appellant's attendance records indicate that there were sufficient opportunities for him to have completed the necessary training within a reasonable period of time. Mr. Breaux failed to avail himself of those opportunities.

Of particular note are the agency's notices in December 1999 and April 2000 that Mr. Breaux had failed to complete training on handcuffing and transporting. Had he completed the training as directed, he might have been more cognizant of the risks involved in the incident on May 14, 2000 that ultimately led to his dismissal.

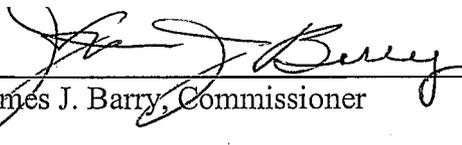
As Mr. McGeehan testified, the agency's "primary mission is safety and security...staff, kids, and community." Mr. Breaux had worked at the facility long enough and was sufficiently familiar with security provisions to know that even when residents were moved within certain areas of the building, they were to be handcuffed. Rather than relying on security protocols, Mr. Breaux chose to rely on his own assessment of his relationship with the residents, choosing to allow three of the residents to leave the building and leave a secure area without any kind of physical restraint. Simply put, that incident demonstrates a serious lack of judgment and a significant failure to meet the work standard.

As set forth in the Rules of the Division of Personnel, a probationary period is a period of full-time work during which a full-time employee is required to demonstrate satisfactory performance of the duties and responsibilities of the position to which the employee has been assigned. On all the evidence and argument, the Board found that Mr. Breaux exercised dangerously poor judgment, putting himself and others at risk. Having done so, Mr. Breaux failed to meet the work standard. Accordingly, the Board voted unanimously to DENY Mr. Breaux's appeal, and to sustain the agency's decision to dismiss Mr. Breaux from his employment as a probationary Youth Counselor I.

THE PERSONNEL APPEALS BOARD

  
Patrick H. Wood, Chairperson

  
Robert J. Johnson, Commissioner

  
James J. Barry, Commissioner

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