State of New Hampshire

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

Appeal of Judy Burt

Docket #2002-T-18

Department of Health and Human Services – Division of Children, Youth and Families

Response to State's Motion to Reconsider and Appellant's Motion for Reconsideration/Rehearing

March 21, 2003

The New Hampshire Personnel Appeals Board is in receipt of the State's December 20, 2002 Motion to Reconsider and the Appellant's January 16, 2003 Motion for Reconsideration/ Rehearing in the Appeal of Judy Burt.

In accordance with Per-A 208.03 (b) of the NH Code of Administrative Rules, "[A] motion for reconsideration or rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Those grounds are briefly summarized below.

In his Motion, Attorney Martin argued that the Board's decision reinstating Ms. Burt constituted an "egregious abuse of its discretion," and was "nothing short of arbitrary and capricious." He argued that the order was "unfair, unjust and irresponsible," since the Board itself found that Ms. Burt's first two warnings were a matter of record, the third warning was justified by the facts in evidence, and the Personnel Rules authorized dismissal by issuance of a third warning for the same offense. Attorney Martin requested that the Board reconsider and reverse its December 13, 2002 decision.

Attorney Reynolds argued that the State failed to prove each of the allegations contained in the third written warning, and that the Board erred in voting to uphold it. He argued that the agency cited the Appellant's alleged failure to meet the work standard, bur failed to "articulate the work standard allegedly not met." Further, he argued, the agency illegally applied standards to the Appellant's work in the Laconia District Office that were different from those that were accepted and encouraged in the Claremont District Office.

Attorney Reynolds argued that the investigation conducted by the agency was inadequate. Once the investigation was completed, he argued, the agency failed to provide the Appellant with the names of all the witnesses or a full and detailed summary of the information that they provided. Attorney Reynolds argued that the Board ignored evidence of the agency's bad faith and malice toward the Appellant, and allowed the dismissal to stand despite evidence that the agency ignored testimony favorable to the Appellant and failed to disclose all the information it considered in deciding to dismiss her. As a result, he argued, the Board could have and should have reinstated the Appellant with full pay and benefits.

Attorney Reynolds argued that the agency violated the progressive discipline provisions of the Rules of the Division of Personnel and illegally "factored in" a number of elements such as counseling memos and performance evaluations. He characterized the third letter of warning as a "cumulative-effect warning." As such, he argued, even though the Appellant never filed an appeal of those earlier warnings, the agency needed to prove each of the specific allegations that those letters contained. He also argued that the Board's findings and rulings were "not clear as to just which specific allegations were being taken as accurate and which were found to be not proven."

In accordance with Per-A 208.03 (e) of the NH Code of Administrative Rules, "A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unseasonable." The Board determined that neither the State nor the Appellant made such demonstration and so voted unanimously to DENY both the

Appellant's Motion for Reconsideration and the State's Motion for Reconsideration. In so doing, however, the Board does clarify certain of its factual findings as set forth herein.

In denying the Appellant's Motion for Reconsideration/Rehearing, the Board found that the arguments raised by the Appellant were essentially the same arguments raised at the hearing and considered by the Board in reaching its decision to partially grant the Appellant's appeal by reinstating the Appellant subject to certain conditions. Although the State's assessment of the Appellant's work performance did vary significantly between the Claremont and Laconia District Offices, the Board rejected the Appellant's assertion that the agency acted illegally in expecting her to meet perfonnance expectations that were in any way different from those accepted at her previous work location or that the State failed to "articulate the work standard allegedly not met." Any difference between investigative and prosecutorial styles in the Claremont and Laconia District Offices was not sufficient to support the Appellant's claim that she was held accountable to a standard that was unlawful, unreasonable or poorly articulated. The Board also rejected the argument that the agency conducted an inadequate investigation, ignored evidence that was favorable to the Appellant during its investigation, and ultimately refused to disclose the information that it considered in dismissing her from her employment. Finally, the Board rejected the Appellant's claim that the agency violated either the provisions of the Personnel Rules for progressive discipline or the Appellant's rights to due process.

The record reflects that the agency conducted regular evaluations of the Appellant's perfonnance, notified her when her performance failed to meet their expectations, and used written warnings as the least severe form of discipline to correct unsatisfactory performance and conduct. The record also reflects that the Appellant was successful in appealing a first written warning and having it reduced to a memorandum of counseling, although she subsequently chose not to appeal or rebut the written warnings issued to her on December 4,2000 and on June 20, 2001. The evidence reflects that the Appellant received a third written warning on May 7, 2002 and was notified of the agency's intent to dismiss her for having three written warnings for the same offense within a period of fewer than five years.[1] The agency delayed a final decision on

[1] The three written warnings actually were issued within a period of three years.

the Appellant's dismissal, granting her request for additional time to refute the evidence supporting the warning and her dismissal. After reviewing and considering the evidence that the Appellant had to offer, the agency revised the written warning. The evidence was insufficient, however, to persuade the agency to remove the warning from the Appellant's file. A decision was then made to dismiss the Appellant as a result of her having received three written warnings for the same offense.

The agency afforded the Appellant all the process she was due under the provisions of the Rules of the Division of Personnel in each of the warnings that it issued. The Appellant chose not to appeal the first two warnings and, as such, waived the opportunity to challenge the validity of those warnings. As stated in the Pre-hearing Order of the Personnel Appeals Board in Response to the State's Motion for Clarification and the Appellant's Objection to the Motion issued by the Board on September 11,2002: "While the fact that a warning has not been appealed does not mean that every allegation contained therein is necessarily true, it does stand as a valid warning for the offenses stated therein." The Appellant did file a timely appeal of the third warning, but was unable to prove that: "1) The disciplinary action was unlawful; (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal; (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or (4) The disciplinary action was unjust in light of the facts in evidence." [Per-A 207.12 (b)]

The termination itself arises out of the issuance of three written warnings for the same offense. Inasmuch as the Appellant chose not to appeal or rebut the first or second written warning, the agency was under no obligation at the time of dismissal to revisit each of the allegations contained therein. The agency did address the evidence supporting each of the allegations in the third and final warning. In summarizing the evidence considered, the agency included the counseling memorandum issued to the Appellant on August 29,2000. Contrary to the due process argument again advanced by the Appellant, the Board found that it was both lawful and appropriate for the agency to do so.

With respect to the sufficiency of the Board's findings of fact regarding the Appellant's failure to meet the work standard, as alleged in the third letter of warning, the Board voted to clarify its findings:

As evidenced by her conduct during the investigations in the Taylor H. and Samantha J. cases, and the complaints received by DCYF from Laconia Detective Sergeant Clark, Barnstead Police Chief Borgia, State Police Detective Supervisor Bruno, State Police Detective Hubbard and State Police Assistant Commander Scarinza, the Boarcl found that the Appellant failed to establish or maintain effective, collaborative working relations with members of the law enforcement community. The Appellant's conduct constitutecl a failure to meet the work standard.

The Board found that the agency legitimately questioned the Appellant's use of sick time when she was reassigned to desk duty, particularly when information was received by DCYF that the Appellant had been observed attencling a meeting at her child's school and visiting a health club, and had asked for records to be brought to her home so that she could make a court appearance.

The Board found that the Appellarzt's interaction with Attorney Landry was unnecessarily confrontational, and so constituted a failure to meet the work standard.

The Appellant was assigned to close a number of overdue cases. The evidence reflects that the Appellant failed to complete those cases. Moreover, the Boarcl found that if the Appellant believed she would be unable to complete the work that had been assigned, it was incumbent upon her to so notify her supervisors. The Appellarzt's conduct constituted a failure to meet the work standard.

In denying the State's Motion for Reconsideration, the Board found that it was within its statutory authority pursuant to RSA 21-I:58 to grant the Appellant's appeal in part, and reinstate the appellant without back pay or benefits, subject to the terms and conditions set forth in its Order. As the Board wrote in its December 13,2002 decision, Per 1001.08 of the Rules of the

Division of Personnel permits but does not require an agency to dismiss an employee by issuance of a third written warning for the same offense. Although the Board found that the third written warning for failing to meet the work standard was justified, when considering all the evidence and argument in their totality, the Board found that the Appellant's past performance and technical abilities, along with her pledge to modify her conduct, mitigated in her favor.

Although there were law enforcement personnel who took issue with the Appellant's conduct and methods of operation, there were others who described her as competent and thoroughly professional. Virtually all the witnesses testified as to the Appellant's overriding dedication to the safety and welfare of children, and some believed they would be able to work with the Appellant more effectively in the future if she were to be reinstated. Often, witnesses came to very different conclusions regarding the Appellant's attitude, performance and behavior, even when viewing the same events or courses of conduct. The evidence speaks clearly to both the Appellant's dedication and technical competence to perform her duties. Indeed, the Appellant's failure to meet the work standard appears to the Board to be due in large part to over-zealousness, which it is incumbent upon the Appellant to control and channel.

The Board has rarely exercised its authority to reinstate an employee terminated by the issuance of a valid, third letter of warning and does not do so lightly here. Further, the reinstatement of the Appellant is subject to the terms and conditions of the Board's decision of December 13, 2002, i.e. without back pay or benefits and subject to assignment of work location, job assignments and training requirements at the einployer's discretion, preservation of all three prior written warnings, and admonishments to the Appellant as set forth in the Board's order. The Board concluded that the granting in part of the Appellant's appeal is a valid exercise of its authority under RSA 21-I:58 on the narrow facts and circumstances of this case and reaffirms its decision of December 13,2002.

The Personnel Appeals Board,

/s/ Lisa A. Rule

Lisa A. Rule, Acting Chair

/s/ Robert J. Johnson

Robert J. Johnson, Commissioner

/s/ Anthony B. Urban

Anthony B. Urban, Commissioner

cc: Joseph D'Alessandro, Director of Personnel, 25 .Capitol St., Concord, NH 03301

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Department of Health and Human Services – Divisiorz of Children, Youth and Families

December 13, 2002

The New Hampshire Personnel Appeals Board (Rule, Johnson and Urban) met on September 18, September 25 and October 16,2002, under the authority of RSA 21-I:58 and Chapters 100-200 of the NH Code of Administrative Rules, to hear the appeal of Judy Burt, a fonner employee of the Department of Health and Human Services. Ms. Burt, who was represented at the hearing by SEA Legal Intern Barbara Klein and SEA General Counsel Michael Reynolds, was appealing her May 17, 2002 dismissal from employment after receiving a third written warning for the same offense. Attorney John Martin and Karen Hutchins, Human Resources Administrator, appeared on behalf of the State.

The record of the hearing in this matter consists of pleadings submitted by the pai-ties, 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

1. March 18, 2002 letter from Laconia Police Detective Sergeant Steven Clarke to Robin Jurta
2. Affidavit of Barnstead Police Chief Kenneth Borgia
3. February 13,2002 statement of Kisha M. Weisensee
4. PD 98-06, CYF Manual titled "Removal of a Child; Ex Parte and Protective Custody"
5. March 27, 2002 e-mail from Beverly MacQuarrie to Natalie Allen concerning Judy Burt

6. Sworn Statement of Attorney Kevin Landry
7. May 7,2002 letter of warning, revised and dated May 17, 2002, issued to Judy Burt for failure to meet the work standard
8. Perfonnance Summary issued to Judy Burt on March 31, 2000
9. August 29, 2000 Memorandum of Counseling issued to Judy Burt for failure to meet work standards
10. Performance Summary issued to Judy Burt on December 5,2002
11. December 4, 2002 letter of warning issued to Judy Burt for failure to meet the work standard
12. March 2001 Review – Judy Burt
13. June 20,2001 letter of warning issued to Judy Burt for failure to meet the work standard
14. Performance Summary for Judy Burt dated January 9, 2002
15. Corrective Action Plan dated February 19, 2002, issued to Judy Burt
16. Lorraine Bai-tlett's notes concerning Judy Burt dated Thursday, March 28
17. April 3, 2002 e-mail to Judy Burt fi-om Lorraine Bartlett concerning work responsibilities
18. April 3 2002 e-mail from Judy Burt to Lorraine Bartlett
19. April 30, 2002 chronology of investigation of agency and individual complaints regarding Judy Burt
20. May 8, 2002 letter fi-om Judy Burt to Ms. Bartlett and Ms. Jurta concerning their decision to issue a written warning
21. May 9, 2002 letter from Lorraine Bai-tlett to Judy Burt establishing the date, time, place and intended discussion at a meeting of "Intent to Dismiss"
22. March 8, 2002 e-mail (with attachments) from Judy Burt to Jay Apicelli
23. October 30, 2000 letter fi-om Corporal Steven Holly to Robin Jurta
24. December 7 and 8, 2000 e-mail correspondence concerning a written warning

Appellant's Exhibits

A. DCYS/Law Enforcement: A Model for Joint Assessment/Investigation (with Appellant's A1, the 2001 revisions)
B. May 13,2002 letter from Detective Sergeant Steven A. Clark addressed "To Whom It May Concern"

C. May 15, 2002 letter from Grafton County Attorney Kenneth Anderson to Robin Jurta
D. Workload Report dated January 9,2002 for Judy Burt
E. April 1,2002 letter from Barnstead Chief of Police Kenneth Borgia to Robin Jurta
F. Handwritten meeting notes dated May 17, 2002
G. Handwritten meeting notes dated May 9, 2002
H. May 17, 2002 Notice of Dismissal issued to Judy Burt by Lorraine Bartlett
I. Affidavit of John P. Curran
J. Affidavit of Beverly MacQuarie

The following persons gave sworn testimony:

Detective Sergeant Steven A. Clarke
Robin Jurta
Lorraine Bartlett
Amy Prince
Detective Robert D'Amore
Detective Richard E. Simmons
Judy Burt
State Police Supervisor John Scarinza
Kenneth Anderson

At the appellant's request, the witnesses were sequestered.

Position of the Parties

Mr. Martin argued that under the Rules of the Division of Personnel, an appointing authority is authorized to dismiss an employee by issuance of a third letter of warning for the same offense within a period of five years. He argued that prior to the May 17, 2002 letter of warning, the appellant had received and had not appealed two prior written warnings for failure to meet the work standard. Therefore, he argued, the only question for the Board to answer was whether or not there was sufficient evidence to justify the third and final warning.

Mr. Martin argued that the appellant received numerous and regular performance evaluations. At first her evaluations showed her meeting expectations, but her worlc performance declined. He argued that the agency counseled her and developed work plans to assist her in improving her performance. Despite those efforts, he argued, the appellant either could not or would not fix the problems. He argued that the warnings show a continuing pattern of the appellant failing to work cooperatively with others inside and outside the agency, and a resulting failure to comply with DCYF regulations and the Attorney General's Law Enforcement Protocol.

Mr. Martin noted that the appellant indicated that she would be able to talce corrective action and modify her behavior. That position, he argued, begs the question of why the appellant didn't change when she had the opportunity to do so. He noted that throughout her appeal, the appellant insisted that she really didn't do anything wrong. He argued that she described Officer Holly as a problein and claimed that Detective Clark "had it out for her." He said she insisted the State Police disliked working with her because she was a woman and others simply didn't want to cooperate with her. In other words, he argued, it was always someone else's fault.

Mr. Martin argued that it is difficult for an agency to make the decision to dismiss an employee. In this case, however, he argued that the State had done everything it possibly could do by way of counseling and assisting the employee, and in the end, there simply was no other choice.

Ms. Klein argued that the standard was not whether or not enough of the final warning was justified, but whether or not the State proved each of its allegations by a preponderance of the evidence. She argued that although the appellant had not appealed her first two warnings, the State still had an obligation to prove each and every one of the facts alleged in those warnings, since they were factored into the decision to dismiss. Ms. Klein argued that the agency conducted a limited and selective investigation, failing to investigate allegations fully and talking only to those persons who were likely to give damaging evidence against the appellant.

Ms. Klein argued that DCYF did not just act sloppily; they acted in bad faith. She argued that there were different standards for conducting investigations when the appellant worked in the Clareinont District Office, that it was standard in Claremont to let a parent know the possible

outcome of an investigation, such as the prospects of having a parent's children removed from the home. Similarly, she said, it was normal in Claremont to obtain one-party consents and use wiretaps or concealed tape recorders to obtain evidence. She argued that the appellant was disciplined for doing what she was originally trained to do.

Ms. Klein aslted the Board to consider the credibility of the witnesses. She argued that while Attorney Landry might have nothing to gain by lying about his exchange with the appellant, he also had nothing to lose. She suggested that Attorney Landry was unhappy that the appellant had challenged his reading of the statute. In terms of the appellant's relationship with law enforcement personnel, Ms. Klein argued that the detectives Sergeant Clark supervised did not support various complaints he made against the appellailt. She argued further that there was miscommunication in the Bristol case and that in Barnstead, Chief Borgia was prejudiced against the appellant by Officer Holly, one of the persons who initially complained about the appellant.

Ms. Klein argued that the appellant agreed there were cases where she could have used better judgment or done a better job. She also admitted that the appellant was perhaps too assertive. Nevertheless, she argued, the appellant was doing a good job overall. She argued that the real motive for the termination was to keep the appellant from "making waves." She argued that the appellant's job was protecting children, not keeping the police happy. She noted that although the appellant had received complaints from three police departments, the State avoided any review of the relationship she enjoyed with a number of other departments.

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

Findings of Fact

1. The appellant was hired by DCYF as an Assessment Worker in the Claremont District Office in 1993, and voluntarily transferred to the Laconia District Office in July 1999.
2. Prior to her transfer to Laconia, all of the appellant's performance evaluations rated her as meeting expectations.

3. The appellant's first performance evaluation following her transfer rated her as meeting expectations in all categories. The evaluator was highly complimentary of the appellant's technical abilities, her willingness to work cooperatively, and her dedication to the job.
4. The March 31,2000 evaluation described the appellant's strengths as, "Her ability to locate resources to provide more quality of services, communications and team approach, sense of humor and willingness to assist others where needed. Judy also has a great ability to re-direct what she is doing quickly."
5. Goals listed in the March 31, 2000 evaluation included, "Judy needs to develop a plan to coinplete her overdues from Claremont within the next 6 months. To always consult with a supervisor and follow procedures used throughout the office. To keep up with current assessments on Bridges and make sure we are in compliance with policy and regulations."
6. On August 29, 2000, the appellant received a Memorandum of Counseling for failing to adhere to agency procedures when she entered a client's home and took photographs within the home without the parent's consent. The letter originally had been issued as a fonnal warning but was reduced to a counseling letter through the informal settlement process outlined in the Personnel Rules, Part Per 202.
7. By November 30, 2000, the appellant's performance evaluations listed two areas as being below expectations: "Prioritizes work effectively and complete assignments on time," and "Worlt is done thoroughly and followed up as required."
8. The November 30, 2000 evaluation included an extensive list of "areas for improvement," describing in the narrative seven separate complaints about the appellant's behavior received by the Department between August 24, 1999 and October 27, 2000 from clients, an attorney, a family court judge and a service provider. Among the complaints was the one that had earlier resulted in the August 29,2000 Memorandum of Counseling.
9. The Department issued a first formal warning by letter dated December 4, 2000, for failure to ineet work standards after an investigation into a complaint from the Alton Police Department concerning the appellant's conduct during an investigation of possible child abuse and her insistence that criminal charges be filed in the case despite the police

department's determination that there was no probable cause upon which to prosecute the case.

10. The appellant did not appeal the December 4, 2000 written warning, request informal settlement of the warning, or file a rebuttal to any of the allegations, and the warning remains a part of the appellant's permanent personnel file.
11. On June 20, 2001, the appellant was issued a second written warning for failure to meet work standards as a result of her decision utilize a Release of Information and not inform others involved in an investigation that the client who had authorized the Release of Information had subsequently withdrawn that release.
12. The appellant did not appeal the June 20, 2001 warning, request informal settlement of the warning, or file a rebuttal to any of the allegations, and the warning remains a part of the appellant's permanent personnel file.
13. On January 9, 2002, the appellant received a performance evaluation that rated her as below expectations in a number of areas including: "Performs responsibilities with a minimum of mistakes;" "When mistakes are made, learns from them and does not repeat the same mistake;" "Spealts with the public and co-worlters in a courteous and helpful manner; when necessary, expresses information in an appropriate fashion;" "Follows policy and procedural guidelines and instructions in an appropriate, effective way;" "Seeks and originates input to and from others when trying to solve problems or achieve goals."
14. The January 9, 2002 evaluation noted a number of strengths, including the appellant's personality, sense of humor, ability to react quickly and confidently in high-risk situations, and improved conformance to office policies and procedures.
15. On March 18, 2002, the Division received a letter of complaint from Laconia Police Detective Sergeant Steven A. Clarlte asserting that the appellant had attempted to circumvent the department's process for case assignment and had interfered on more than one occasion with their investigation in child abuse cases, impeding their ability in one instance to properly interview and polygraph a witness.
16. Sergeant Clarke also complained that instead of consulting with him or apprising him of her dissatisfaction with the way cases were handled, the appellant had gone directly to the County Attorney's Office.

17. On March 21, 2002, the appellant engaged in a verbal confrontation with Attorney Kevin Landry of the Office of Child Support over confidential payor information that she believed she was entitled to receive from that office. Attorney Landry indicated that when he tried to explain to her why she was mistaken and how she was misreading the law, her behavior was "disrespectful, obnoxious, demanding, argumentative, condescending and thoroughly unprofessional." The appellant testified that over the course of eight years, she never had difficulty getting the written documentation she was seeking, and said that she was neither condescending nor unprofessional. She testified that, "He was persistent. I was persistent."
18. On March 25, 2002, the Department received a complaint from Barnstead Chief of Police Borgia about the appellant's conduct at a meeting of the Belknap County Chiefs of Police in which the appellant reportedly disrupted the meeting by interrupting the participants and behaving in a rude and disrespectful manner. Chief Borgia also complained of the appellant's conduct during an investigation and indicated that his department felt it could no longer work with her. The appellant indicated that Chief Borgia and others at that meeting were more interested in discussing "Helpline" than cooperation in joint investigations, and she characterized her behavior as simply trying to "steer the conversation back to joint investigations" because that's what she believed she had been called to discuss.
19. On March 28, 2002, in a meeting with Lorraine Bartlett and Robin Jurta, State Police Detective Russ Hubbard and Detective Supervisor Bob Bruno indicated that the appellant had interviewed a child in an abuse case without police being present and, against the advice of police, had attempted to obtain permission for a "one party consent" to have a conversation between the child's mother and the alleged perpetrator tape recorded without his consent.
20. Officers Hubbard and Bruno also asserted that the appellant failed to advise them that the child who had made the allegations of abuse had recanted. The appellant testified that she didn't tell state police about the recantation because she "didn't want to change the focus" of the investigation and she wanted it known that the child recanted only when she knew that she and her mother were going home to confront the alleged perpetrator.

21. Detective Bruno requested that another worker be assigned to the case, as the child's mother refused to work further with the appellant and the State police believed the appellant's behavior had damaged the case and interfered with the police investigation.
22. On April 3, 2002, the appellant was assigned to "deslc duty" and instructed to begin closing out more than one-hundred fifty overdue assessments. She was expected to close out ten cases per day.
23. The Department indicated that it assigned her to "deslc duty" as a way of keeping her out of the field, where there had been a substantial number of complaints about her conduct, and as a means of catching up on a substantial number of cases that were seriously overdue.
24. On April 5, 2002, the mother of a child in an abuse case informed the Department that the appellant had threatened to have her children removed from the home through an ex parte order unless she agreed to the appellant's protection plan for the children and cooperated with the appellant's methods of investigation.
25. Monday April 8 through Friday April 12, the appellant called in sick every day but Tuesday, when the appellant had a court case scheduled.
26. On Thursday, April 11, the appellant was seen at Gilford Elementary School and at an exercise club. The appellant called in sick again on Friday, and produced a doctor's note indicating that she would be out of worlc until April 24.
27. On Tuesday, April 16, Ms. Jurta learned that the appellant had called the office to have transcripts brought to her home for one of her court cases. Ms. Jurta indicated that the appellant was out on medical leave, that she was not to have work delivered to her home, and she was not to appear in court while she was on leave. That same afternoon, the appellant came to the office with another doctor's note saying that she was free to return to worlc. The appellant felt it was unreasonable for them to put her on desk duty and testified that accommodations should have been made sooner to allow her to close out her old cases. She indicated that she called in sick because she was "too stressed by being under investigation." She testified that her appearance at the elementary school was for a parent teacher conference and she needed to fulfill her parental obligations. She also testified that she did go to an exercise club because her doctor had advised her that "exercise would help alleviate some stress."

28. The appellant indicated that her doctor released her back to work because she had explained that it was more stressful to think about the children she should be protecting. She testified that she went to her doctor and said, "I've got to do this for these children."
29. The appellant called in sick on April 22 and 23, reported to work on April 24 and 25 to prepare for and attend a court hearing. She called in sick again on April 26, and took annual leave on the morning of April 29.
30. By April 30, the appellant had completed ten assessments. Her supervisors indicated that they were "disappointed but not shoclted" because the appellant had not been in the office.
31. On Monday, May 6, 2002, Lorraine Bastlett and Robin Jurta met with the appellant to review the various complaints the Department had received. When asked, the appellant declined to have someone present to represent her.
32. Ms. Jurta and Ms. Bartlett showed the appellant the letter from Chief Borgia, the statement from Taylor H's mother alleging that the appellant had threatened her with an *ex parte* order to remove her children, and discussed the complaint about her behavior from Attorney Landry. The appellant denied that she had acted inappropriately in any of the incidents being discussed. She said she believed the police didn't like women, Taylor H's mother had misunderstood her during their conversation, and the alleged confrontation with Attorney Landry was simply a difference of opinion between professionals.
33. Ms. Bai-tlett then issued the appellant a third warning dated May 7, 2002 for failure to meet the work standard.
34. Ms. Bartlett and Ms. Jurta met with the appellant and her SEA representative Don Taylor again on May 9, 2002. Ms. Bartlett advised her that termination might be imminent, based on the appellant having received three written warnings. The appellant asked for additional time to prepare a rebuttal. A follow-up meeting was scheduled for May 17.
35. As a result of information provided by the appellant, the May 7th warning was revised and reissued on May 17th. After considering the information and reviewing the allegations, the Department issued Ms. Burt a notice of dismissal under the provisions of Per 1001.08 (b)(1) of the NH Code of Administrative Rules, terminating her employment by issuance of the third and final warning for failing to meet work standards.

Rulings of Law

A. Per 1001.03 of the NH Code of Administrative Rules provides that "An appointing authority shall be authorized lo use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance or misconduct..."

B. The offenses for which an appointing authority is authorized to issue a written warning include: "(1) Failure to meet any work standard..." [Per 1001.03 (a) NH Code of Administrative Rules]

C. Per 1001.08 (b) of the NH Code of Administrative Rules authorizes an appointing authority to dismiss an employee upon issuance of a third written warning for the same offense within a period of five years, or by issuance of a fifth written warning for various offenses within a period of five years.

D. Per 1001.08 (c) of the NH Code of Administrative Rules prohibits the dismissal of a classified employee until the appointing authority: "(1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee; (2) Offers to provide the einployee with an opportunity to refute the evidence presented by the appointing authority… [and] (3) Documents in writing the nature and extent of the offense."

E. In accordance with Per 1001.08 (d), "If an appointing authority, having complied with the provisions of Per 1001.08(c), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall: (1) Provide a written notice of dismissal, specifying the nature and extent of the offense; (2) Notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I:58, within 15 calendar days of the notice of dismissal; and (3) Forward a copy of the notice of dismissal to the director."

F. RSA 21-I:58, I, provides that, "Any permanent employee who is affected by any application of the personnel rules...may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal....If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the einployee's former position or a position of like seniority, status, and pay....In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just.

Decision and Order

On all the evidence and argument, the Board found that the third letter of warning issued to the appellant on May 17, 2002 was justified. The Board also found that under the Rules of the Division of Personnel, the appointing authority was authorized to dismiss the appellant by issuance of the third warning. The Board also found that the agency complied with the Rules of the Division of Personnel in the manner in which the third and final warning was issued. The appellant was apprised of the evidence supporting her termination and she was given an opportunity to refute that evidence.

While Per 1001.08 (b) authorizes dismissal by issuance of a third warning for the same offense within a period of five years, termination under those circumstances is not mandatory. The agency readily admits that Ms. Burt possesses the technical ability to perfonn her assigned duties, and did so over an extended period of time. Her evaluations describe her as someone with keen insight, a good sense of humor, and the ability to work collaboratively. Even those witnesses called to testify against her admitted that her only motive was protecting children, and there were widely differing accounts of many incidents at issue.

The Board found that although the decision to dismiss the appellant was lawful and was effected in compliance with the Rules of the Division of Personnel, her past performance, her technical abilities and her apparent willingness to modify her behavior mitigate in her favor. Therefore, under the authority granted to the Board by RSA 21-I:58, I, to "...reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just," the Board voted unanimously to order the appellant reinstated to her position as a Child Protective Service Worlter, subject to the terms and conditions stated below. Each of the warnings issued to the appellant shall remain on file and shall remain valid for the purposes of additional disciplinary action up to and including termination from employment.

Inasmuch as the termination did not violate the law or the Rules of the Division of Personnel, the appellant shall be reinstated without the benefit of back pay or other benefits such as credit to the Retirement System, accumulation of leave or seniority credit, and the period of absence shall be treated as an unpaid personal leave. Reinstatement shall occur within 30 days of the date of this order. The agency shall have full authority to assign the appellant to the district office where she can receive appropriate supervision and evaluation of her performance, and to malte such work assignments as will best serve the needs of the agency. The agency also may impose such other training requirements upon the appellant as it shall see fit.

The appellant is cautioned to take those steps to modify her behavior and correct her work performance that the agency may require. Those steps, at a minimum, should include improving relationships with supervisory personnel and outside agencies. The appellant must also be mindful of her obligations to adhere scrupulously to the rules and regulations that govern her conduct in her position as a Child Protective Service Worlter. The appellant is admonished to respond in a positive and cooperative fashion with employees inside and outside the agency, and to take whatever training, direction and supervision the agency may offer.

As set forth above, the appeal is therefore GRANTED IN PART.

The Personnel Appeals Board,

/s/ Lisa A. Rule

Lisa A. Rule, Acting Chair

/s/ Robert J. Johnson

Robert J. Johnson, Commissioner

/s/ Anthony B. Urban

Anthony B. Urban, Commissioner

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