

State of New Hampshire



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

APPEAL OF JOHN CHAPMAN

Docket #00-T-12

Department of Corrections

November 15, 2000

The New Hampshire Personnel Appeals Board (Wood, Rule and Johnson) met on Wednesday, June 21, 2000 and Wednesday, August 16, 2000¹, under the authority of RSA 21-I:58, to hear the appeal of John Chapman, a former employee of the Department of Corrections. Mr. Chapman, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing his March 28, 2000 termination from employment as a teacher on charges that he violated the State's Sexual Harassment Policy. Attorney John Vinson appeared on behalf of the Department of Corrections.

The record of the hearing in this matter consists of pleadings submitted by the parties, including requests for findings of fact and rulings of law submitted by the State at the conclusion of the hearing; notices and orders issued by the Board; the audio tape recording of the hearing on the merits; and documents admitted into evidence as follows:

State's Exhibits

1. March 27, 2000 memo from Gaye Fedorchak to William McGonagle, Marilee Nihan, and Warden Cunningham concerning "Possible Sexual Harassment Situation"

¹ Originally, the second day of hearing was scheduled for 1:30 p.m. on July 12, 2000, following the conclusion of the Randall Patrick appeal. However, at the request of the parties [See letter dated July 11, 2000 from Michael Reynolds to the Personnel Appeals Board], the Board agreed to reschedule the conclusion of the hearing to August 16, 2000, with the understanding that if the Board were to rule in the appellant's favor and that ruling resulted in an award of back-pay, that pay would be tolled for the period of July 12, 2000 through August 16, 2000.

2. March 30,2000 letter from Warden Cunningham to John Chapman informing him of his dismissal from employment, effective March 29,2000, for violation of the State's Sexual Harassment Policy and DOC Policy and Procedure Directives 2.29 and 2.16 III. F.
3. Department of Corrections PPD 2.39, Sexual Harassment
4. Department of Corrections PPD 2.16, Rules and Guidance for DOC Employees
5. November 25, 1997 Performance Evaluation for John Chapman
6. March 27, 1998 Performance Evaluation for John Chapman
7. Diagram of the education office at the Department of Corrections State Prison, drawn by Sharon Nolin at the hearing on June 21,2000
8. June 15,2000 letter from John Vinson to Michael Reynolds concerning witnesses and exhibits for the Chapman hearing, with the following attachments: March 27,2000 memo from Gaye Fedorchak to William McGonagle, Marilee Nihan, and Warden Cunningham, signed by Sharon Nolin on March 28,2000; May 4,2000 handwritten report from Sharon Nolin to Warden Cunningham
9. Department of Corrections statements of Mission, Values, Integrity, Respect, and Professionalisin
10. Table titled "Evaluating General Electric's Leaders"

The following persons gave sworn testimony:

John Chapman	Steven Rogers
Sharon Grace Nolin	William McCann
Michael J. Cunningham	Deborah St. Laurent
Judith Laforest	Marilee Nihan
Gaye Fedorchak	

The State argued that Mr. Chapman engaged in a continuing course of conduct that created a hostile work environment for Sharon Nolin, a Records Clerk assigned to the education office, thereby violating the State's Sexual Harassment Policy. The specific charges, quoted from the

March 30,2000 notice of termination sent to Mr. Chapman by Warden Cunningham [State's Exhibit 2], are as follows:

- "In the fall of 1999, you accompanied a female employee to the NH Department of Corrections Warehouse. While worlting in the Warehouse, the female employee let you into a caged area where she was worlting. The door to the cage was secured. Soon thereafter you grabbed the employee and attempted to kiss her."
- "In March of 2000, the same employee overheard a conversation between you and another employee concerning plans to spend an evening in a topless bar, This conversation was of a sexual nature and created a hostile work environment. Sometime soon thereafter you made an indirect invitation to the female employee by saying 'I would ask you but I know you wouldn't go.'"

In addition to the specific charges listed above, the State argued that Mr. Chapman made Ms. Nolin uncomfortable by repeatedly asking her out on dates, and writing her a series of increasingly offensive e-mail messages, including one that asked her to be "his Valentine" and others commenting on her clothing and appearance.

The appellant argued that on the totality of the evidence, the State would be unable to prove its charge of sexual harassment. Instead, the appellant argued, the evidence would prove that the Department of Corrections terminated Mr. Chapman's employment as a way of proving that the State is "tough" on sexual harassment.

Findings of Fact and Summary of Events Leading Up to the Termination

In the fall of 1999, shortly after she had begun working as a records clerk for the education office at the State Prison, Sharon Nolin had files to deposit and records to retrieve from the "archive cage" at the Prison Warehouse. On that same date, Ms. Chapman had materials to retrieve from the "education cage," and he walked from the Prison to the Warehouse with her. Upon arrival at the Warehouse, finding that the archive cage door was jammed, Mr. Chapman got assistance

from another staff person to open the gate and allow Ms. Nolin to get into the work area. Once the gate had been opened, Mr. Chapman offered to help Ms. Nolin with her files. Ms. Nolin declined, saying, "No, it's easier for me to just do it," although she "was distressed about the record set up [which included] difficult work to lift the boxes and search the archive files..." She indicated that, "John probably could see this. His sincere intent seemed to be to lend me a hand in this effort" [State's Exhibit 1].

Having completed his own work, Mr. Chapman returned to the "archive cage" and began a conversation with Ms. Nolin. Ms. Nolin was unable to hear him, and because she wanted to keep working and still be able to talk to him, she unlocked the gate and let him into her work area, re-locking the gate after he had entered the archives section. According to her statement [State's Exhibit 1], Ms. Nolin told the appellant that locking the cage made her "feel safer because [she] knew that an inmate could not get in from the outside while [she] was working through the files." Mr. Chapman then tried to put his arms around Ms. Nolin and kiss her.

Ms. Nolin pushed the appellant away and said, "John, don't do that." Mr. Chapman apologized and left. Ms. Nolin stayed and finished her work. Ms. Nolin told Judith LaForest about Mr. Chapman trying to kiss her, but she made no formal report of the incident to anyone until March, 2000, when she was questioned by Gaye Fedorchak.

Beginning in the late fall of 1999, Mr. Chapman offered to help Ms. Nolin learn how to use the e-mail system in the office by exchanging messages with her. Ms. Nolin said that at first the messages from Mr. Chapman were very professional and included inquiries like "How are you" and "How is the job going." According to Ms. Nolin, the messages changed some time before February, 2000, when Mr. Chapman began commenting about Ms. Nolin's appearance, or how he liked the clothing she was wearing. On February 14, 2000, Mr. Chapman sent Ms. Nolin an e-mail asking her to be his Valentine. Ms. Nolin testified that while a Valentine coming from a spouse or from a child would be appropriate, she found Mr. Chapman's gesture "extraordinarily childish and offensive," saying that she was not the one he should be asking to be his Valentine. Nonetheless, she thanked him for the Valentine.

Ms. Nolin never objected specifically to the content of Mr. Chapman's e-mail messages, none of which were offered into evidence. However, at some point Ms. Nolin informed Mr. Chapman that in a class she was taking, she had learned that e-mail could be retrieved even after it had been deleted. She asked him to stop sending her messages, which he did.

Throughout the fall of 1999 and into the middle of March, 2000, after the incident in the warehouse, Mr. Chapman frequently walked Ms. Nolin to her car, even when their cars were not parked in the same lot. Mr. Chapman recalled asking Ms. Nolin if she minded him walking her to her car. Ms. Nolin did not recall such a conversation, but said that if Mr. Chapman had asked her, she would have told him that she didn't mind.

In March, 2000, Ms. Nolin overheard a conversation between Mr. Chapman and a co-worker, Mark O'Dell, about going to a strip club or a topless bar in Massachusetts. Neither Mr. Chapman nor Mr. O'Dell was aware that Ms. Nolin could hear them. When the conversation ended and Mr. O'Dell had left, Ms. Nolin told Mr. Chapman that she knew of a better club closer to the New Hampshire border. Mr. Chapman said something to the effect of, "I'd ask you to go, but I know you wouldn't." Ms. Nolin agreed that she would not go.

On one or more occasions, Mr. Chapman invited Ms. Nolin out to dinner, or dinner and dancing. Ms. Nolin refused, noting the fact that Mr. Chapman was married. Mr. Chapman made subsequent references to wishing that she would go to dinner with him, or that he would prefer her company at lunch to that of another female friend of his.

On or about March 22, 2000, after Mr. Chapman had walked with Ms. Nolin and Ms. Sanborn to the lot where their cars were parked, Ms. Nolin asked Ms. Sanborn if she didn't consider it unusual that Mr. Chapman walked her to her car almost every day. Ms. Sanborn repeated the conversation to Bill Swenson, who reported it to his own supervisor, Phil McGonagle. Mr. McGonagle questioned Nance Sanborn about the information, and subsequently directed Gaye Fedorchak to discuss the matter with Ms. Nolin. On March 23, 2000, Ms. Nolin was called for

an interview with Gaye Fedorchak to discuss her relationship with Mr. Chapman. Ms. Fedorchak subsequently reported their discussion in a memo to William McGonagle, Marilee Nihan and Warden Cunningham, dated March 27, 2000, signed by Ms. Nolin on March 28, 2000 (State's Exhibit 1).

On March 23, 2000, at Ms. Fedorchak's suggestion, Ms. Nolin spoke privately with Mr. Chapman, asking him to please stop walking her to her car. She did not discuss any other behavior that she found uncomfortable or offensive. Neither Ms. Nolin nor Ms. Fedorchak informed the appellant that they were preparing a formal report about Mr. Chapman's conduct with Ms. Nolin.

On March 28, 2000, Mr. Chapman was called to a meeting in the Warden's office. Steve Rogers, a union member, was called to act as Mr. Chapman's representative. During the meeting, which lasted approximately fifteen minutes, Warden Cunningham informed Mr. Chapman of the charges concerning the incident in the warehouse and the discussion of the strip club. He suspended Mr. Chapman pending completion of Ms. Fedorchak's report, and told Mr. Chapman that he was not to discuss the allegations with anyone outside of the office.

The following day, March 29, 2000, Mr. Chapman was directed to return to the department for a meeting with the warden. Steve Rogers and SEA Field Representative William McCann accompanied him to the meeting. Upon Mr. Chapman's arrival, Warden Cunningham handed the appellant a single-page notice of suspension and directed Mr. Chapman to sign it. Immediately thereafter, Warden Cunningham began to relate information from the Fedorchak memo.

Mr. Chapman said he had never seen the document and asked for an opportunity to review it. Warden Cunningham allowed Mr. Chapman, Mr. Rogers and Mr. McCann to use his conference room to meet privately and review the allegations. At about the time the three had finished reading the memo, Warden Cunningham called them back into his office, telling them he was in a hurry and had another meeting to attend. Warden Cunningham asked if Mr. Chapman admitted or denied the allegations. According to Ms. Nihan, when Mr. Chapman attempted to discuss the

allegations, Warden Cunningham "kept him to task," permitting him to respond only with yes or no answers to the charges. Warden Cunningham indicated that he found the first and fifth charges (those appearing in the letter of termination) to be true. He informed Mr. Chapman that he was being terminated immediately for sexual harassment. The meeting lasted less than 30 minutes.

Findings of Fact

The Board ruled as follows on the State's Request for Findings of Fact:

#1 is granted to the extent that Mr. Chapman attempted to put his arms around Ms. Nolin and to kiss her. The evidence does not reflect that he "grabbed" her.

#2 - 17 are granted to the extent that they are consistent with the summary above.

The Board made additional findings of fact as follows:

18. John Chapman, the appellant, has worked as a teacher at the Department of Corrections for approximately fourteen years.
19. Throughout the course of his employment, Mr. Chapman has received satisfactory performance evaluations, although evaluations issued to him in 1997 and 1998 noted difficulties that he was having interacting comfortably or confidently with other staff. His supervisor attributed these problems to "a general lack of self-confidence" [State's Exhibit 5].
20. Sharon Nolin made Mr. Chapman's acquaintance when she began working in the education department at the State Prison in October, 1999.
21. They had what Ms. Nolin and Mr. Chapman both characterized as a friendly relationship.
22. After the warehouse incident when Mr. Chapman attempted to kiss Ms. Nolin, Ms. Nolin continued to treat Mr. Chapman as a friend and confidant, sharing with him substantial amounts of information about herself and her personal life.

23. Ms. Nolin indicated that it would have been inappropriate for her to go to dinner or dinner and dancing with Mr. Chapman because he was married.
24. Although Ms. Nolin says that she was uncomfortable with some of Mr. Chapman's conduct, she continued to confide in him. When asked why she continued to walk with him to her car, she testified, "You have to remember, it gave me a chance to talk, too."
25. There is no evidence that Mr. Chapman was aware that Ms. Nolin could overhear his conversation with Mark O'Dell about going to a strip club or a topless bar.
26. After Mr. O'Dell left, Ms. Nolin initiated further discussion of the appellant's plans to go to a strip club, telling Mr. Chapman that she knew of a better club closer to the state line.
27. Inasmuch as Ms. Nolin initiated the subsequent discussion with Mr. Chapman about strip clubs, it is unreasonable to believe that the conversation between Mr. Chapman and Mr. O'Dell, or the conversation with Ms. Nolin created an offensive, intimidating, or hostile working environment.
28. The Department of Corrections did not refer the Fedorchak memo to the Director of Personnel to initiate a sexual harassment investigation.
29. The Department of Corrections did not initiate a formal departmental investigation into Mr. Chapman's conduct.
30. The Department of Corrections never notified Mr. Chapman that Warden Cunningham had initiated an informal investigation into the appellant's conduct.

Rulings of Law

The Board ruled as follows on the State's proposed Rulings of Law:

#1 - #5 are granted to the extent that they are consistent with the decision below.

#6 and #7 are denied.

The Board made additional Rulings of Law as follows:

- A. "The policy of the NH Department of Corrections is to prevent sexual harassment in the work place. Acts that constitute sexual harassment include, but are not limited to,

unwelcome sexual advances, suggestions or requests for sexual favors and other verbal or physical conduct of a sexual nature when: A. Submission to such conduct is either explicitly or implicitly a term or condition of an individual's employment..." [DOC PPD 2.39 III, A].

B. "The following definition of sexual harassment is intended to describe the conduct prohibited by this policy: Sexual Harassment: an unwelcome sexual advance, a request for a sexual favor, or other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of or creating an intimidating, hostile or offensive working environment... Other sexually harassing conduct, whether committed by supervisory or non-supervisory personnel, is also prohibited. Such conduct includes, but is not limited to: repeated verbal abuse of a sexual nature; repeated offensive sexual flirtation; graphic verbal comments about an individual's body; sexually degrading words to describe an individual; repeated brushing, touching, patting, or pinching an individual's body; sexually explicit gestures; the display in the workplace of sexually suggestive, sexually demeaning, or pornographic objects, pictures, posters or cartoons; inquiring or commenting about sexual conduct or sexual orientation or preferences; or verbal abuse consistently targeted at only one sex, even if the content of the abuse is not sexual" [State's Policy on Sexual Harassment, part II].

C. "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 the complainant's agency or from the Division of Personnel as investigator of the complaint..." [State's Policy on Sexual Harassment, part III, A].

- D. "All complaints shall be investigated expeditiously by the investigator. All interested persons shall be afforded an opportunity to submit information relevant to the complaint" [State's Policy on Sexual Harassment].
- E. "Investigations shall be completed and a written report issued within thirty (30) days of receipt of the complaint. The investigator's report shall be disclosed to the complainant. If the investigator makes a determination that the complaint was proven by a preponderance of the evidence, the investigator shall disclose the report to the agency head along with a recommendation for corrective and/or disciplinary action. The recommendation shall be based on the severity of the offense which shall be determined according to the totality of the circumstances. The intensity, frequency, and duration of the prohibited conduct shall be considered by the investigator. Other factors may include the extent to which the misconduct, however minor, may serve to isolate, limit, intimidate or otherwise increase the difficulties of job performance or atmosphere in the workplace for the complainant" [State's Policy on Sexual Harassment, part III, B].
- F. "...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" [RSA 21-I:58, I].

Standard of Review

"Dismissal shall be considered the most severe form of discipline. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as but not necessarily limited to... (19) Sexual harassment" [Rules of the Division of Personnel, Per 1001.08 (a) Dismissal].

Decision and Order

RSA 21-I:58, I authorizes the Personnel Appeals Board "...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." Having considered all of the evidence and argument offered by the parties, and in light of the above findings of fact and rulings of law, the Board voted unanimously under the authority of RSA 21-I:58 to order Mr. Chapman's termination from employment converted to a disciplinary suspension without pay for a period of 90 days. Accordingly, Mr. Chapman's appeal is GRANTED IN PART.

The Department of Corrections dismissed the appellant on two very specific charges. The evidence supports the first charge, that Mr. Chapman put his arms around Ms. Nolin and attempted to kiss her, although the characterization that Mr. Chapman "grabbed" Ms. Nolin is unsupported by the testimony. Despite Mr. Chapman's assertion that he "...tried to calm [Ms. Nolin] down by going over to her and giving her a hug and a symbolic kiss" [Direct examination of John Chapman, 6/21/2000], the appellant certainly should have realized that such uninvited physical contact would constitute a violation of the State's and the Department's Sexual Harassment Policies.

The evidence also supports the fact that Ms. Nolin overheard a conversation between Ms. Chapman and another employee about going to a strip club. However, the evidence does not support the State's conclusion that the conversation created a hostile work environment. Ms. Nolin was not included in the original conversation, nor were Mr. O'Dell and Mr. Chapman aware that Ms. Nolin could overhear what they were saying. Therefore, it is reasonable to believe that the conversation would have ended when Mr. O'Dell left if Ms. Nolin had not asked Mr. Chapman questions about his plans, and had not suggested a better club for him to visit. Inappropriate as Mr. Chapman's remark may have been about taking Ms. Nolin with him, it is unlikely that the remark would have been made without Ms. Nolin's suggestion of a "better" establishment to visit.

According to the State's policy, allegations of sexual harassment are to be referred to the Director of Personnel who, in turn, assigns a human resources representative from the Division of Personnel or from the complainant's agency to investigate the complaint. During the course of the investigation, all interested persons are to be afforded an opportunity to submit information relevant to the complaint. Based upon the information gathered during the course of the investigation, the investigator then submits a report and, when appropriate, a recommendation for corrective and/or disciplinary action, taking into consideration the severity of the offense in light of all the circumstances surrounding the alleged conduct, as well as the intensity, frequency, and duration of any prohibited conduct.

Despite its reliance on the State's and the department's sexual harassment policies as a basis for Mr. Chapman's termination from employment, the Department of Corrections effected that termination without conducting any meaningful investigation of the facts surrounding the alleged misconduct. Had the Department of Corrections complied with the State's Sexual Harassment Policy, or its own internal policies on harassment and investigations of harassment, there might have been sufficient evidence to support Mr. Chapman's termination from employment. However, on the facts in evidence, the Board found that Mr. Chapman's conduct and resulting violation of the State's Policy on Sexual Harassment was not so severe or so pervasive as to warrant his immediate dismissal without prior warning.

Therefore, on all the evidence, the Board found that Mr. Chapman's termination under the provisions of Per 1001.08 (a) could not be sustained. However, the Board found that the incident in the warehouse when Mr. Chapman attempted to kiss Ms. Nolin constituted a violation of the State's Sexual Harassment Policy and was sufficiently egregious to warrant a substantial penalty.

Accordingly, the Board voted to impose a 90 days suspension without pay, with the warning that any further documented instance of sexual harassment shall result in the appellant's immediate termination from employment. The appellant shall be reinstated as a teacher within 30 days of the date of this order at a mutually agreeable date and time. Any retroactive compensation for which the appellant may be eligible shall be calculated in accordance with RSA 21-I:58.

As set forth above, the appeal of John Chapman is GRANTED IN PART

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chairman


Lisa A. Rule, Commissioner


Robert J. Johnson, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Michael Reynolds, SEA General Counsel, PO Box 3303, Concord, NH 03302-3303
John Vinson, Corrections Counsel, Dept. of Corrections, 105 Pleasant St., Concord, NH
03301

Personnel Appeals Board

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State's Request for Findings of Fact and Rulings of Law

Findings of Fact

1. Sometime in late fall of 1999, John Chapman grabbed Ms. Sharon Nolin in an enclosed area in the Prison warehouse, and attempted to kiss her.
2. Ms Nolin pushed Mr. Chapman away.
3. Mr. Chapman apologized
4. Mr. Chapman continued over the next few months to ask Ms. Nolin out for dinner and dancing.
5. Mr. Chapman would go out of his way to walk Ms Nolin to her car.
6. Mr. Chapman was married.
7. Ms. Nolin was single.
8. Ms. Nolin declined his invitations.
9. Mr. Chapman engaged in a conversation with a fellow employee about going to a club where women stripped.
10. Ms. Nolin overheard the conversation.
11. Mr. Chapman made a statement to Ms Nolin that he would invite her to the club but knew she would not go.
12. She replied that he was right.
13. Mr. Chapman sent emails to Ms. Nolin complimenting her on her clothing, and inviting her to be his valentine.
14. These emails made Ms. Nolin uncomfortable
15. The State of New Hampshire and the Department of Corrections have policies prohibiting sexual harassment.
16. Violation of either policy can result in immediate dismissal.
17. Sexual Harassment in the workplace violates the Department of Corrections Mission and Values statements.

Rulings of Law

1. PPD 2.16, PPD 2.39, Per. 1001.08(a)(19) as well as the State Policy, prohibit sexual harassment.
2. These policies provide for dismissal of those engaged in such conduct.
3. Mr. Chapman conduct violated the State's Sexual Harassment Policy and the Department of Corrections Policy against sexual harassment
4. Mr. Chapman's conduct violated Ms. Nolin's right to a work in an environment free of sexual harassment
5. The Department of Corrections presented sufficient evidence to prove that Mr. Chapman violated these policies
6. Mr. Chapman's conduct viewed objectively was severe and pervasive enough to create an abusive work environment.
7. Dismissal is an appropriate sanction in this case.