

State of New Hampshire



PERSONNEL APPEALS BOARD
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APPEAL OF APRIL CROWLEY NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS

Docket # 2003-T-11

August 17, 2005

The New Hampshire Personnel Appeals Board (Wood, Johnson, and Urban) met on June 4, 2003, November 12, 2003 and November 19, 2003 under the authority of RSA 21-l:58, I, to hear the appeal of April Crowley, a former employee of the New Hampshire Department of Corrections. Ms. Crowley, who was represented at the hearing by Attorney Michael Reynolds, SEA General Counsel, was appealing her November 4, 2002, termination from employment for allegedly violating Per 101.08(a)(4) and for violating departmental policies and procedures by using unnecessary force by striking an inmate with a closed fist while the inmate was being restrained and for using inappropriate language. Attorney John Vinson, assisted by Warden Jane Coplan and Major Dan Shaw, represented the New Hampshire Department of Corrections.

This appeal was heard on a full evidentiary basis. The record of the hearing in this matter consists of pleadings submitted by the parties to the hearing, the audio tape recording of the hearing on the merits of the appeal, notices and orders issued by the Board, the documents admitted into evidence, and the testimony of various witnesses.

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The parties submitted a stipulation concerning various facts in this matter, In addition, the parties offered as Joint Exhibit 1 the videotape of the incident on June 3, 2002 at the Special Housing Unit, "SHU," of the New Hampshire State Prison in Concord.

The State had forwarded to the Board fifteen exhibits numbered one through fifteen, At the beginning of the hearing, the Agency indicated that it would not offer Exhibit 1 at this time, but may offer it later during the hearing depending upon the testimony that it received. It would take the same approach with exhibits 13 through 15. Exhibits 2 through 12 were then offered into evidence and were admitted without objection. Exhibits 2 through 12 are the following:

State's Exhibits

2. Memo from Warden Jane Coplan dated November 5, 2002
3. Letter of termination from Warden Jane Coplan to April Crowley dated November 4, 2002
4. Incident report from David O'Brien dated July 12, 2002
5. Statement form dated July 9, 2002 from Sergeant Dan Boynton
6. Statement form dated July 9, 2002 from Corrections Officer (CO) Alan B. MacPherson
7. Statement form dated July 9, 2002 from CO Frank H. Logan III
8. New Hampshire Department of Corrections Policy and Procedure Directive on the subject of "Safeguarding of Residents in Departmental Facilities"
9. New Hampshire Department of Corrections Policy and Procedure Directive on the subject of "Use of Physical Force in Departmental Activities"
10. New Hampshire Department of Corrections Policy and Procedure Directive on the subject of "Rules and Guidance for DOC Employees"
11. Copy of RSA 627:5 dealing with physical force in law enforcement acknowledged by April Crowley on April 29, 2002
12. Copy of an essay on why you want to become a corrections officer

In addition, during the course of the proceedings, the Agency did introduce Exhibit 1, which was admitted into evidence. Exhibit 1 is a statement dated June 3, 2002 from Nurse Donna Timulty. The statement refers to an incident on June 3, 2002, but is actually dated November 12, 2002.

Also admitted into evidence was Exhibit 14, a performance summary for April Crowley dated July 20, 2001, covering the period from January 1, 2001, to July 6, 2001.

The state also offered the following exhibits, which were admitted into evidence.

16. Interview report dated 03-31-03 conducted by Mary P. Castelli, SAAG-Civil Bureau, with Thomas Bilavsky, Corrections Officer
17. Incident report date 06103102 by Sergeant Dan Boynton, completed 614102
18. Memo from Major Dennis W. Cox to Commissioner Phil Stanley dated August 21, 2002 concerning his investigation
19. Statement from April Crowley undated but consisting of three handwritten pages
20. Schedule of employment of April Crowley for the period of December 14, 2001 through November 4, 2002

The Appellant introduced the following exhibits:

- a-1 Outline of the videotape which was admitted without objection subject to the understanding that the information set forth in the video outline would not be accepted as fact, but merely as introductory information with the videotape itself determining the facts
- a-2 Statement form dated 1017102 from Corporal Lance Bennett
- a-3 Affidavit of Officer Thomas Bilavsky dated 6 November 2003
- a-4 Appellant's statement form dated 1018102 from Sergeant Edwin Hanson
- a-5 Copy of Article XXVII from the Collective Bargaining Agreement dealing with the Corrections-Prisons & Secure Psychiatric Unit
- a-6 Performance summaries of CO April Crowley:
 - the first dated 12117101 covering the period of 2125101 to 2/25/02
 - the second dated 10119101
 - the third dated 12120100 covering the period of 9129101 12120100
 - the fourth dated 8126100 covering the period from 2/25/00 to 8125100
- a-7 Copy of the Notification of Administrative Rights of Employee Under Investigation from Warden Coplan to CO April Crowley dated July 22, 2002
- a-8 Letter from Commissioner Phil Stanley to April Crowley dated September 16, 2002 extending the 45-workday requirement for the employee investigation
- a-9 Statement form dated 613102 from Thomas Bilavsky
- a-10 Handwritten statement for Sergeant Dan Boynton completed 6104102
- a-11 Statement form dated 613102 from Jay Christie

In addition to the above exhibits, the Board heard testimony from the following witnesses:

Corporal Lance Bennett
Sergeant Daniel Boynton
CO Alan B. MacPherson
Donna Timulty, RN
Craig Edsall
Frank Harding Logan III
Edwin Nils Hanson
Warden Jane Coplan
Major Dan Shaw
Wayne Brock
Appellant, April Crowley

The Board held open the record of the hearing in order to allow the parties to submit closing arguments in writing. Both parties submitted their written arguments on December 3, 2003.

Narrative Summary

At the time of her dismissal, the appellant was working as a Corrections Officer assigned to the SHU (Special Housing Unit) of the NH State Prison for men. While working in the area of the cells, officers are required to wear protective gear including a vest, helmet and face shield. Also, officers normally work that area in teams of two. On June 3, 2002, while walking outside the cells, the appellant was not wearing protection for her head and face, and was working alone. She did, however, signal the Officer in Charge to listen to activity in the cell area. Officer Logan also indicated that Ms. Crowley asked him to observe her while she was on the I-tier due to problems she was having with Inmate Rose. As Ms. Crowley moved

down the tier, Inmate Rose threw some liquid at the appellant, hitting her in the head and face. While the liquid was not specifically identified, it was implied that the liquid was urine, or a combination of urine and soap.

Ms. Crowley left the tiers and reported the incident to Sergeant Boynton, the Officer in Charge that day. After conferring with a superior officer, Sergeant Boynton assembled a first response team to extract the inmate from his cell if he refused to "cuff-up." Officers who have been subjected to assault by an inmate normally would not be assigned to an extraction team to confront the inmate, but in this instance, Officer Crowley was asked to participate and did act as part of the cell extraction team.

Before extracting Inmate Rose from his cell, the officers cleared the other cells on the tier. When the first response team arrived at Inmate Rose's cell, they found that he had barricaded the door to his cell with his mattress. The officers warned him to remove the mattress and cuff-up or they would come in for him. He refused several orders to comply, and the team initiated a "roll-in," entering the room with a shield and pepper spray, spraying him at least twice. The officers wrestled him to the floor, then carried him to the day room where he was placed, face down, on a restraining stretcher. The officers' interaction with inmate Rose in the day room was recorded on video tape, although Ms. Crowley and others testified that there was a period of time that the video recorder was off.

Although the videotape of the incident does not show Ms. Crowley punching or kicking Inmate Rose, the videotape of the incident does show a very violent episode as the officers struggled to keep the inmate restrained. It provides evidence that the inmate was yelling and using foul language, and that one or more of the officers yelled back and used similarly foul language, though it is difficult to determine from the tape precisely which of the officers yelled. Ms. Crowley admitted that she did yell and did use vulgar, inappropriate and unprofessional language during the incident, including the use of racial epithets, sexually explicit language and sexually demeaning taunts;

All of the officers involved in the cell extraction were required, as a matter of policy and procedure, to complete an incident report. None of those initial reports, including the report by Officer Crowley, refer to an assault by Officer Crowley, or refer to taunting the inmate or using inappropriate language.

According to the testimony, shortly after the incident, Nurse Donna Timulty, Officer Logan and Officer MacPherson reported to Sergeant Boynton that the appellant had assaulted Inmate Rose. Nurse Timulty did not complete an incident report, expecting to be interviewed by investigators after making her verbal report to Sergeant Boynton. Neither Officer Logan nor Officer MacPherson included a description of the alleged assault in their incident reports, although they did verbally report the behavior to Sergeant Boynton. Sergeant Boynton also failed to report the alleged assault to his own superiors.

Sergeant Boynton did apparently share the details of the allegations with his wife and said he believed Officer Crowley should be disciplined. Sergeant Boynton's wife, who also worked for the Department, later contacted Major Shaw, informed him that Ms. Crowley had assaulted an inmate, and said she did not believe Ms. Crowley should be allowed to get away with it.

Ms. Crowley received notification on July 22, 2002, that an investigation had been initiated into her alleged abuse of a person under departmental control and inappropriate conduct or language. During the course of the investigation, each of the officers who participated in the June 3, 2002, cell extraction and restraint, and Ms. Timulty, RN, were required to submit written statements. Those statements include detailed information about the alleged assault, and provide a fairly consistent description of Ms. Crowley becoming physically and verbally abusive toward Inmate Rose. The reported behaviors include using unnecessary physical force, inappropriate and unprofessional language, and taunting the inmate.

Prior to her dismissal, Ms. Crowley was provided a copy of the investigation into the incident and was given the opportunity to refute the evidence that that the Department relied on in determining that her conduct violated both the Department's Policies and Procedures and the Rules of the Division of Personnel.

Sufficiency of the Evidence

The State argues that, "The evidence is overwhelming that Ms. Crowley punched Inmate Rose." (State's Closing arguments dated December 3, 2002.), while the appellant argues that, "The Department of Corrections (DOC) failed to meet its burden of proof on its allegations." (Appellant's Closing Arguments dated December 3, 2002.)

The appellant asks the Board to find that there is no "gap" in the videotape and the tape does not show Ms. Crowley assaulting Inmate Rose, thereby providing no "inculpatory evidence." While that may be true, the videotape also does not give a clear view of Ms. Crowley throughout the entire incident. As such, it has limited evidentiary value other than to show the relative size of the inmate and the officers, the difficulty of the cell extraction, and the level of resistance by the inmate as officers attempt to restrain him. The testimony of the witnesses was far more useful in determining the truth of the allegations.

Although the statements provided by the State's witnesses immediately following the incident are clearly incomplete and, arguably, intended to deflect the prospect of an investigation by omitting critical details, the statements later given by those witnesses during the course of the investigation are consistent with their testimony at hearing.

The Board gave considerable weight to the testimony of Nurse Timulty. Despite the appellant's attempts to discredit her testimony as given to protect "her former roommate," her testimony to the Board is consistent with that of Sergeant Boynton and Officer MacPherson, both of whom testified that after reporting Officer Crowley's behavior during the investigation, they were avoided by first shift staff and accused of being "rats."

Nurse Timulty readily admits that she did not submit a written statement immediately after the incident, but testified that she spoke to Sergeant Boynton. Sergeant Boynton's testimony corroborates her testimony,

and is further supported by the subsequent call from Sergeant Boynton's wife to Major Shaw, complaining that Ms. Crowley should not be allowed to "get away with it."

By comparison, Ms. Crowley's own statements at various points – immediately following the incident, in her June 20, 2002, statement, when questioned by investigators, and in testimony before this Board – give differing accounts of what occurred on June 3, 2002. Her original statement omits virtually any information about the use of force or inappropriate language, by herself or others. When questioned by Investigator O'Brien, Ms. Crowley denied being angry or agitated, using sexually explicit language or racial epithets, or using force of any kind. In a statement dated 6/12/02, however, Ms. Crowley gave a contradictory account, stating:

"I did tell him – 'Do not f i n g try it.' Once IIM Rose was in the restraints he started yelling obscene gestures towards me (example – that I sucked n d and that I eat c____.) Was I wrong for doing this, yes it was completely unprofessional of me and my anger did take over. I was upset and raged (sic) that my mouth did get the best of me do (sic) to the fact that my head just drenched with a substance I did not know what it contained. I can not recall everything I/M Rose was saying that night nor can I recall all of my responses. In conclusion to that evening I did not have anyone say to me that I should have watched my mouth (I realized once I've calmed down some I should been (sic) a bit more professional and rational) and to leave dayroom. No one said anything to me until Mr. Mayer & Lt. Baxter approached me a couple of days later." (State's 19)

The appellant asks the Board to discount the testimony of the State's witnesses, arguing that their initial reports of the June 3, 2002, incident do not include any report of assault, excessive force, obscene language, or taunting. In point of fact, none of the initial statements, including the appellant's own statement, give a true accounting of what occurred during the incident with Inmate Rose. The appellant's witnesses say that they saw nothing. The appellant's testimony was not consistent with her statements during the investigation. The State's witnesses gave testimony consistent with that which they reported once a formal investigation was under way. Simply put, the State's evidence was more persuasive.

Burden of Proof

The appellant argues that the State has the burden of proving each of its allegations by a preponderance of the evidence. A "preponderance of the evidence," however, is not the same as "evidence beyond a reasonable doubt." Thus, in deciding the appeal, the Board must weigh the evidence, including the credibility of witnesses, in determining both the truth of the allegations underlying the discipline, and the propriety of the discipline taken. The appellant's burden in this instance is defined by Per-A 207.12 (b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board):

"In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence 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."

The appellant also asks the Board to find that the Department of Corrections violated her due process rights, arguing that the Department failed to provide timely notification of an official investigation and later failed to provide her with a reasonable opportunity to refute "all of the evidence" that the State considered in reaching its decision to dismiss her from her employment.

With respect to the propriety of the notice of investigation, the Board found there was insufficient evidence to support the appellant's position that she did not receive timely notice. The State offered evidence of the

incident report filed by David O'Brien and subsequent notice of both the investigation and an extension of time for completing the investigation. If the appellant disputed the timeliness of the notice or legitimacy of the extension of the investigation, those issues should have been raised within the context of a timely-filed grievance under the terms of the Collective Bargaining Agreement.

As to the appellant's due process rights, they are defined by Per 1001.08 (c) of the NH Code of Administrative Rules (Rules of the Division of Personnel), which states:

"No appointing authority shall dismiss a classified employee under this rule 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 employee with an opportunity to refute the evidence presented by the appointing authority provided, however:

a. An employee's failure to respond to a request for a meeting with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part.

b. An employee's refusal to meet with the appointing authority shall not bar the appointing authority from dismissing an employee pursuant to this part; and

(3) Documents in writing the nature and extent of the offense. "

With respect to the State's compliance with the provisions of Per 1001.08 (c), the Board found that the Department of Corrections provided the appellant access to the evidence supporting her dismissal, as well as an opportunity to refute that evidence. It would be unreasonable for the Board to expand the meaning of "evidence" to include an appointing authority's process in weighing the evidence, or every "factor" a decision-maker considers in reaching a decision to dismiss an employee.

The fact that Warden Coplan reviewed some of the evidence with some of the witnesses is not "evidence" as the appellant argues. Rather, it describes a process of weighing the evidence, but is not, in and of itself, evidence. The appellant essentially is asking the Board to require an appointing authority to disclose more than the evidence upon which it relied, but the process the appointing authority used in considering the evidence, the reason why that decision maker considered some pieces of evidence to be more persuasive than others, and how the decision ultimately was reached.

The State met its burden of producing sufficient evidence to persuade the Board that the allegations set forth in the letter of termination are accurate. The appellant did not prove, by a preponderance of the evidence, that the disciplinary action was unlawful, or that the appointing authority violated the rules of the Division of Personnel by imposing the disciplinary action under appeal.

On the evidence presented, the Board made the following Findings of Fact and Rulings of Law. To the extent that the parties' proposed Requests are consistent with the narrative above and the decision below, they are granted. Otherwise, they are denied.

Findings of Fact

1. On June 3, 2002, in the course of a cell extraction and subsequent restraint of Inmate Joseph Rose, the appellant used excessive force, striking Inmate Rose with a closed fist and kicking him, although there was no evidence of actual injury to the inmate.
2. On June 3, 2002, in the course of a cell extraction and subsequent restraint of Inmate Joseph Rose, the appellant used sexually demeaning and sexually explicit language, as well as foul language and racial epithets.
3. The appellant's behavior during a cell extraction and subsequent restraint of Inmate Joseph Rose on June 3, 2002 violated Department of Corrections Policies and Procedures.

Rulings of Law

- A. The appellant's conduct during a cell extraction and subsequent restraint of Inmate Joseph Rose on June 3, 2002, violated the Rules of the Division of Personnel, Per 1001.08 (a)(4), in that the appellant was the aggressor in a fight or an attempt to injure another person in the workplace.
- B. Violation of Per 1001.08(a)(4) subjects an employee to immediate dismissal without prior warning, provided that the employee is afforded the opportunity to review the evidence supporting the decision to dismiss, and an opportunity to refute that evidence.
- C. Although RSA 21-I:58, I, allows the Personnel Appeals Board to modify any order of the appointing authority, or to make such other order as it deems just, the appellant failed to offer evidence or argument to persuade the Board that the November 4, 2002, decision dismissing Ms. Crowley from her position as a Corrections Officer was unlawful, unreasonable, or unjust.

Decision

Based on all the evidence and argument, the Board voted unanimously to DENY Ms. Crowley's appeal and to uphold the Department of Corrections' decision to dismiss her from her employment in accordance with Per 1001.08 (a)(4).

Additional Observations and Recommendations

As an additional note, the Board struggled with this decision for an extended period. As has been said many times at various hearings, there is supposed to be a "para-military" standard for Department of Corrections officers in light of the nature of their duties. However, the Board was distressed, to say the least, that not one of the original written reports of the incident with Inmate Rose contained reference to the facts that led to the disciplinary action ultimately taken against Officer Crowley.

To the Board, this signifies a serious failure of management to train its officers and a serious failure of the officers and their union to support the officers in valuing the basic concepts of honesty and integrity as critical factors in creating and maintaining a secure workplace. As in the military, trust among comrades comes from knowing that, even in the heat of battle, they will do the right thing, and not from knowing they can be counted on to hide the truth. If honesty and truthfulness are the signs of "rats," then perhaps we should be more concerned about the seaworthiness of the ship.

THE PERSONNEL APPEALS BOARD


Patrick H. Wood, Chair


Robert J. Johnson, Commissioner

Anthony B. Urban, Commissioner

cc: Karen A. Levchuk, Director of Personnel
Michael Reynolds, SEA General Counsel
John Vinson, Corrections Counsel