

State of New Hampshire

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PERSONNEL APPEALS BOARD

State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF PAUL A. DANE
Docket #93-T-5

December 14, 1992

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, November 18, 1992, to hear the appeal of Paul Dane, a former employee of the New Hampshire State Prison, Department of Corrections. Mr. Dane was represented at the hearing by Attorney James Clark-Dawe. Attorney Michael K. Brown appeared on behalf of the Department of Corrections.

In preliminary matters, Attorney Brown raised the following objections:

- 1) The notice of appeal was deficient, failing to specify any grounds upon which to claim the termination was improper.
- 2) The appellant failed to notify the Department of Corrections he had filed an appeal of his termination.
- 3) Counsel for the appellant failed to notify either the Board or the Department of Corrections of his appearance in the instant appeal.
- 4) Counsel for the appellant failed to make timely disclosure of his intention to call any witnesses.

Attorney Clark-Dawe advised the Board he had been appointed by the Court to represent Mr. Dane in the matter of the assault charges in Merrimack County Superior Court. He admitted he had failed to file his appearance with the Board or notify the Department of Corrections he would be appearing on Mr. Dane's behalf, but said he had only recently agreed to appear as Mr. Dane's representative in this matter. He informed the Board that he intended to call only two witnesses, the appellant and the appellant's supervisor at the prison, Barry Caldon. He said Mr. Caldon would testify that the appellant was a good employee with a good work record, and that there have been other employees of the Department of Corrections in similar circumstances who had served jail sentences but had not been discharged from employment.

Attorney Brown indicated he had provided his list of witnesses and copies of his proposed exhibits to Mr. Dane. He said Mr. Dane never responded to communication from the Department concerning the hearing. Attorney Brown asked the Board to exclude the testimony of Mr. Caldon, arguing the Department would be prejudiced by the appearance of a surprise witness.

Regarding Attorney Brown's objection to the appellant being represented by counsel, Per-A 202.06 (c) of the Rules of the Personnel Appeals Board provides

the following:

"If one party has such representative, such representative shall notify the Board and the other party of such representation in writing at least five (5) working days before the date of the hearing. The late filing of appearances may be allowed, upon motion, by the Board for good cause shown.

After deliberating briefly, the Board agreed to allow Attorney Clark-Dawe to appear on the appellant's behalf. Even in the absence of a formal motion for late filed appearance, the Board determined the State would not be prejudiced by allowing the appellant to be represented by counsel. However, the Board found that the appellant had made no effort to comply with the Board's procedural rules and voted, pursuant to Per-A 202.08 (c) of those Rules, to exclude Mr. Caldon's testimony.

On the evidence presented by the parties, the Board made the following findings of fact:

On March 21, 1990, the appellant was arrested by Concord Police and charged with simple assault, to which the appellant subsequently pled guilty. Concord District Court fined the appellant \$150 and gave him a 30 day suspended jail sentence. On November 9, 1990, the appellant received a written warning from the Department of Corrections under the optional discharge provisions of the Personnel Rules, for misconduct as a result of that incident. The appellant was advised that any similar act of misconduct would result in his termination from employment.

The appellant was charged again with simple assault on July 10, 1991. However, the case was dismissed on December 3, 1991, when the woman bringing the charges failed to appear.

On December 22, 1991, the appellant was again arrested on charges of assault and contempt of bail. The appellant was found guilty in Concord District Court of the assault charge on April 4, 1992, with the Court imposing a \$500 fine and 6 month sentence at the Merrimack County House of Corrections. Mr. Dane's attorney filed an appeal of that conviction, requesting a de novo trial in Merrimack County Superior Court. That matter remains under appeal.

On a Motion to Bring Forward the suspended sentence from the first assault conviction, the Court directed the appellant to appear in Concord District Court again on August 4, 1992. The appellant requested and received approval for leave on that date to allow him to appear in Court as scheduled. Judge Sullivan ordered the earlier suspended sentence brought forward, and the appellant was immediately taken into custody and confined at the Merrimack County House of Corrections from August 4, 1992 through August 23, 1992.

Once having been taken into custody, the appellant called his fiancée and asked her to advise his supervisor at the prison he had been incarcerated. He

believed she notified Mr. Dane's supervisor the following day, August 5, 1992. He did not ask her to discuss use of leave with the supervisor or any other official at the Department of Corrections.

During his incarceration, the administration of the House of Corrections allowed Mr. Dane to contact Viola Lunderville, Administrator of Security, and Major Joseph Guimond directly by phone at the Department of Corrections. During his discussion with them, he did not request leave, although he did have accrued leave available which he could have requested to use. Mr. Dane was discharged from his employment by letter dated August 21, 1992, which cited absence without leave and misconduct as the grounds for dismissal. He was released from the House of Corrections on August 23, 1992.

Attorney Brown argued that the appellant had received written notice on November 9, 1990, and that he fully understood any subsequent acts of misconduct could result in his dismissal from employment. He argued that nonetheless, Mr. Dane subsequently engaged in a continuing course of conduct which the Department of Corrections could not tolerate. Specifically, Attorney Brown contended the appellant violated the Department's code of conduct, defined in part by Policy and Procedures Directive 2.2.16 IV (Q):

"Any person who, while employed by the Corrections Department, is found guilty in a Court of law of a misdemeanor or a felony may be in violation of this rule. The fact that the offense may have been committed while the employee was in a non-duty status is immaterial. It is a duty requirement that employees report to their supervisors when they are charged with a misdemeanor or felony, and the outcome of such charges."

Attorney Brown also argued the State acted reasonably in discharging the appellant for absence without leave, in violation of the Department's Policy and Procedures Directive 2.2.16 IV (A):

"Employees who are, through their own fault, not at the place where they are required to be at a prescribed time are absent without leave."

Attorney Brown argued that the appellant never made a meaningful attempt to request paid or unpaid leave for his period of absence during his incarceration at the Merrimack County House of Corrections. Attorney Brown argued that the appellant had been allowed to telephone Ms. Lunderville and Maj. Guimond from the House of Corrections, but never requested the use of leave. He also argued the appellant could have made a written request by mail that his leave be considered an approved leave, but never made that request. He argued the appellant was, therefore, absent without leave through his own fault.

Attorney Clark-Dawe argued that Mr. Dane's absence during the period of incarceration (August 4, 1992 through August 21, 1992) occurred for reasons

completely outside the appellant's control. He argued that in retrospect, it would have been wiser had the appellant formally requested leave, but suggested the appellant reasonably believed the absence would simply be counted against his available balance of accrued leave. Attorney Clark-Dawe also argued the appellant could not be discharged. Therefore, he contended the appellant could not be deemed in violation of P.P.D. 2.2.16 IV (A) and should not have been disciplined for absence without leave. He also argued the appellant's August 4, 1992 conviction for simple assault was under de novo appeal to Merrimack County Superior Court. He contended the appellant's case for reinstatement would have little or no basis if he were to be found guilty of the assault charges. However, he argued that the Department of Corrections had no authority to take disciplinary action against the appellant unless the appellant was convicted as a result of his de novo hearing. He argued that until a verdict was rendered, the appellant was entitled to the presumption of innocence and could not be discharged merely on the basis of charges pending in Superior Court.

Attorney Brown argued that, unlike a jury, the Department of Corrections did not have to rely upon a finding, beyond a reasonable doubt, that the appellant was guilty of assault before deciding to terminate his employment for misconduct. He argued the Court had imposed the appellant's suspended sentence to address the continuing course of conduct exhibited by Mr. Dane since he pled guilty in 1990 to charges of simple assault. He argued that the Department of corrections was entitled to apply the same standard in finding the appellant in violation of the Department of Corrections P.P.D. 2.2.16 IV.

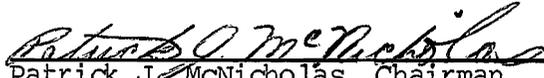
Mr. Dane admitted he expected to be disciplined as a result of his incarceration, but was a "little bit surprised" when the Department of Corrections discharged him. Mr. Dane testified he had access to the mail system during his incarceration, but never wrote to the Prison or the Department of Corrections to request the use of leave. Mr. Dane also admitted he had not requested leave when he had been allowed to telephone Ms. Lunderville's office prior to his release from the House of Corrections.

On the evidence, the Board found the Department of Corrections acted within its authority in dismissing Mr. Dane. The Board found the State was not obliged to stay its decision to discharge Mr. Dane pending the outcome of his Superior Court appeal. While the letter of warning makes it appear that the appellant was arrested, charged with assault, found guilty and jailed almost simultaneously, the record reflects the appellant was arrested on December 22, 1991, found guilty of the charges in Concord District Court on April 10, 1992, incarcerated in the Merrimack County House of Corrections on August 4, 1992. The Department of Corrections did not terminate Mr. Dane's employment when he was arrested in December, 1991, or when he was found guilty on April 10, 1992. It was not until the Court brought forward the suspended sentence and incarcerated him, and until the appellant failed to request or receive approval for leave that the Department terminated his employment.

Mr. Dane was familiar with the process for requesting leave, as evidenced by his testimony concerning the use of "comp time" for his court appearance on August 4, 1992. He did not, however, request any leave for the following nineteen days. Attorney Clark-Dawe asked the Board to find the appellant had acted reasonably in assuming his absence would be compensated from his available balance of leave, and that the appellant had done all he needed to do in providing the Department of Corrections with notice of his absence by asking his fiancée to inform his supervisor he was in jail.

The Board does not agree. Particularly in light of the conditions set forth in the appellant's November 9, 1990 letter of warning, the appellant had an affirmative obligation to assure he was not in violation of any other departmental policy or procedure, or any rule of the Division of Personnel. Mr. Dane was responsible for requesting leave, but failed to do so. His expectation that the Department of Corrections would simply consider him in an authorized leave status after having been incarcerated for conduct which, in and of itself, could have led to his termination was not a reasonable expectation. Accordingly, the Board voted unanimously to deny his appeal. In so doing, the Board found that the Department of Corrections did not act improperly when it discharged him from his employment, effective August 21, 1992, for absence without approved leave and misconduct.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett


Lisa A. Rule

cc: Virginia A. Vogel, Director of Personnel
Michael K. Brown, Esq., Department of Corrections
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