

# State of New Hampshire



**PERSONNEL APPEALS BOARD**  
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## **Appeal of Rae (LaChance) DeGara**

### **Department of Transportation**

**Docket #95 - T-7**

**July 3, 1995**

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and McGinley) met Wednesday, June 14, 1995, to hear the appeal of Rae DeGara, a former probationary employee of the Department of Transportation. Ms. DeGara was appealing her August 25, 1994 termination from employment for allegedly failing to meet the work standard. The appellant appeared pro se. Senior Assistant Attorney General Michael Walls appeared on behalf of the Department of Transportation. Thomas McGahan, former Director of Administration, testified on behalf of the State. The appellant, Rae Ann (LaChance) DeGara, testified on her own behalf. The following exhibits were entered into the record without objection:

DOT A: New Hampshire Department of Transportation Policy 5.02 "Appointing Authority" with Appendix A (Personnel Actions and Appointing Authority)

DOT B: New Hampshire Department of Transportation Policy 5.03 "Discipline of Employees"

Appellant's #1: August 12, 1994 letter of warning from John Scott, Human Resources Administrator, to Rae LaChance

Appellant's #2: "50 Best Ways to Approach Life"

Appellant's #3: August 25, 1994 letter of termination from Thomas McGahan, Director of Administration, to Rae LaChance

The record in this matter consists of correspondence between the parties and the Board, documents entered into the record as exhibits at the hearing, and the audio tape recording of the hearing.

Ms. DeGara asked the Board to find that her termination from employment as a Human Resources Assistant I was both arbitrary and illegal. She testified that she had received a written warning on August 12, 1994, for the same incident which was cited on August 25, 1994, in her termination. She argued that her termination was arbitrary and illegal because she had relied on her own supervisor's assurances that she would not be subject to additional disciplinary action unless she repeated the offense or failed to take the corrective action outlined in the warning.

Mr. Walls asked the Board to find that Ms. DeGara was a probationary employee who was properly terminated from employment under the provisions of Per 1001.02 of the Rules of the Division of Personnel prior to completion of her probationary period for failing to meet the work standard. Mr. Walls also asked the Board to find that the August 12, 1994 letter of warning issued to Ms. DeGara by Mr. Scott should not be considered binding upon the State because Mr. Scott was not authorized to issue the warning without first seeking and obtaining the approval of his own supervisor, the Director of Administration. Further, he asked the Board to find that to the extent that Ms. DeGara may have relied upon Mr. Scott's representations, she had no legal basis for that reliance.'

### **State's Motion to Dismiss**

At the conclusion of the appellant's case, Mr. Walls had asked the Board to dismiss the appeal, arguing that Ms. DeGara had failed to produce evidence that her termination as a probationary employee was arbitrary, illegal, capricious, or made in bad faith, and therefore that her appeal should be dismissed. After deliberating briefly, the Board voted unanimously to deny the Motion. In so doing, the Board found that Ms. DeGara had produced sufficient evidence to create a *prima facie* case of a illegal termination by asserting that the Department could not upgrade an apparently proper letter of warning into a termination from employment. Therefore, the Board required the State to proceed with its case at the conclusion of Ms. DeGara's presentation.

### **Standard of Review**

Per 1001.02 (a) of the Rules of the Division of Personnel provides the following:

"At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not:

- (1) arbitrary;
- (2) illegal;
- (3) capricious; or
- (4) made in bad faith."

Ms. DeGara admitted that her conduct demonstrated a serious error in judgement. However, she argued that the Department could not legally terminate her employment because she had already been disciplined for that offense by receipt of a written warning. Ms. DeGara also argued that upgrading the discipline from a written warning to a termination was illegal because her own supervisor had assured her in writing that there would be no additional discipline unless she committed a further offense. She referred to her August 12, 1994, letter of warning which stated specifically, "Should there be any repetition of an incident like this

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Mr. Walls argued that the "doctrine of apparent authority" normally does not apply to government.

and/or should you fail to take the corrective action outlined above, further disciplinary action, up to and including discharge from employment, shall be taken." Ms. DeGara asked 'to be reinstated with full back pay, benefits and seniority 'credit.

### **Findings of Fact**

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

1. Ms. DeGara started working in the Department's Bureau of Human Resources on July 22, 1994, as a Human Resources Assistant I. Ms. DeGara had prior work experience in the areas of personnel and human resources administration.
2. Less than three weeks after assuming her responsibilities as a Human Resources Assistant I, Ms. DeGara began to worry that a recently-hired, temporary employee was spreading rumors about her, telling fellow employees that Ms. DeGara was a troublemaker. Ms. DeGara lost a previous position through what she characterized as a "personality conflict", and decided that the best way to protect herself this time would be to get as much information as possible about the new co-worker.
3. Ms. DeGara understood that before coming to the Department of Transportation, the other employee had worked at U.P.S. Without authorization, Ms. DeGara obtained information from the employee's **personnel** file and contacted U.P.S. by telephone about the individual. Under the guise of conducting a reference check, Ms. DeGara questioned U.P.S. personnel about what the employee's job duties had been, what her job performance was like, how she had gotten along with her co-workers, and what the circumstances were under which she had left the company.
4. On August 11, 1994, Ms. DeGara met with her supervisor, John Scott, to discuss her alleged misuse of her position in improperly obtaining and using information about a co-worker. Ms. DeGara admitted to the misconduct and told her supervisor that she understood that she had committed an extreme error in judgement.
5. On August 11th, after leaving work for the evening, Ms. DeGara became increasingly concerned about what disciplinary action the Department might take against her. She called Mr. Scott at his home to discuss the issue, and, when Mr. Scott asked what she would consider to be an appropriate discipline, Ms. DeGara suggested that a letter of warning could be placed in her file. Ms. DeGara believed that an employee who received three letters of warning could be dismissed.
6. On August 12, 1994, Mr. Scott issued a letter of warning to Ms. DeGara for lack of dependability and for inappropriate, unacceptable behavior. Ms. DeGara acknowledged receipt of the warning, signing her name on the line indicating, "I acknowledge receipt of this warning, but my signature may or may not indicate agreement." Someone circled

the word "may" in the section for certification of receipt. Ms. DeGara did not appeal the warning.

7. The Department of Transportation requires its managers and supervisors to review with the Administrator of the Bureau of Human Resources and the appropriate Division Director all letters of warning before they are issued. Any letter of warning issued by Mr. Scott would have been subject to those requirements (DOT Policies 5.02 and 5.03) as well as the provisions of PART Per 1000 of the Rules of the Division of Personnel.
8. Mr. McGahan met with Mr. Scott on August 24, 1994, for an update on Mr. Scott's files and projects prior to Mr. Scott being removed from his position as the Administrator of the Bureau of Human Resources. During that meeting, Mr. Scott showed Mr. McGahan a copy of the letter of warning which had been issued to Ms. (LaChance) DeGara on August 12, 1994.
9. Prior to the meeting with Mr. Scott on August 24, 1994, Mr. McGahan was unaware of either the incident involving Ms. DeGara or the letter of warning issued by Mr. Scott.
10. Mr. McGahan called a meeting in his office on August 25, 1994, with Ms. DeGara and Mr. Murphy, the newly appointed Acting Human Resources Administrator, to discuss the incident described in the letter of warning. After hearing Ms. DeGara's version of events, Mr. McGahan determined that she had committed a serious offense which was sufficiently egregious as to warrant Ms. DeGara's immediate termination from employment. Ms. DeGara asked Mr. McGahan to reconsider his decision, noting that she had already been disciplined with a letter of warning. Mr. McGahan refused to reconsider his decision. ,

#### **Rulings of law**

- A. As a probationary employee, Ms. DeGara was subject to the provisions of Per 1001.02 of the Rules of the Division of Personnel, which permitted the Department to terminate her employment at any time prior to completion of the probationary period for failure to meet the work standard, provided that her termination was not arbitrary, illegal, capricious, or made in bad faith.
- B. Ms. DeGara's termination was not arbitrary. In deciding to terminate Ms. DeGara's employment, the Department took into consideration a number of factors, including the seriousness of the offense in relationship to the position to which Ms. DeGara had been appointed, and whether or not the offense would have been sufficiently serious to warrant termination of a permanent rather than a probationary employee. Having decided that the offense was serious enough to warrant immediate termination of a permanent employee, the State decided that it was sufficient to warrant termination of a probationary employee.

- C. Ms. DeGara's termination was not capricious. While the decision to terminate Ms. DeGara's employment was made quickly, it was not made on a whim, nor did it represent a sudden, unreasoned change of mind on Mr. McGahan's part. Mr. McGahan, the appointing authority, was unaware of Ms. DeGara's offense until August 24, 1994. After meeting with Ms. DeGara and allowing her to explain her actions, Mr. McGahan decided to terminate her employment.
- D. Ms. DeGara was not terminated in bad faith. The decision was not improper in light of the facts, and there was no evidence of a motive for the termination other than removing an employee who failed to meet the work standard.
- E. Ms. DeGara's termination was not illegal.

The facts in evidence clearly demonstrate that Ms. DeGara failed to meet the work standard as a probationary Human Resources Assistant I. Ms. DeGara testified that she had prior work experience in personnel management and human resources administration. She knew that it was improper for her to obtain information either from her co-worker's file or former employer for her own use. Ms. DeGara understood that she was acting without authorization and in violation of the confidence placed in her. She demonstrated an understanding of the seriousness of her offense when she called Mr. Scott at his home to discuss the issue in anticipation of some disciplinary action against her. Ms. DeGara's suggestion that a letter of warning could be placed in her file without objection or appeal offers further evidence that she understood the gravity of her situation.

### Decision and Order

Under Mr. Walls' theory of the case, Mr. Scott did not have the authority to issue a letter of warning to Ms. DeGara without Mr. McGahan's approval, and therefore could not bind the department with any representations which he might have made which were outside the scope of his authority or responsibility. He argued that the doctrine of apparent authority does not apply to the State and its officials. Ms. DeGara insisted that terminating her employment was illegal because the Department of Transportation had already disciplined her once for the incident described in her letter of warning, and therefore could not legally discipline her again for the same offense. Ms. DeGara's assertion of governmental estoppel is the question on which the appeal turns.

In City of Concord v. Tomvkins, 124 N.H. 467-468 (1984), the New Hampshire Supreme Court stated, in part:

"The party asserting estoppel bears the burden of proof ... There are four essential elements of estoppel: first a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter;

third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury..."

"Thus, estoppel may be applied against the government as a result of conduct or statements by government employees, provided that the government employees had the authority to act and the party invoking governmental estoppel satisfies the elements of estoppel..."

"Recent Court decisions have applied governmental estoppel in only those circumstances where the party asserting estoppel has relied, to his or her detriment, in good faith and reasonably, upon the governmental conduct or representation alleged..."

The evidence reveals that Mr. Scott did not have the authority to act unilaterally in issuing Ms. DeGara a letter of warning, and that he was, or should have been, aware of the limitations on his authority. There is no evidence that Ms. DeGara would have known; or should know, that existing DOT policies limited his authority with regard to issuing letters of warning, or that the conditions contained in such a warning, if issued, would not be binding upon the department. Therefore, the Board must conclude that pertinent information was misrepresented, and that Ms. DeGara was ignorant of the truth of the matter. The Board also found that Mr. Scott presented the information with the intention of inducing Ms. DeGara to rely upon it, as evidenced in part by her decision not to appeal the August 12, 1994 letter of warning.

While Ms. DeGara proved the first two elements of estoppel, and attempted to prove the third, she offered no evidence or argument that relying on Mr. Scott's representations<sup>2</sup> caused her to be dismissed, or that she would have taken some other course of action if she had not relied on Mr. Scott's representations. Therefore, the Board found that the termination was not illegal, and voted unanimously to dismiss Ms. DeGara's appeal.

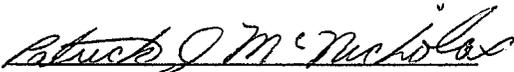
In so doing, the Board notes that this decision relies on the presence of several essential elements including the seriousness of the offense in relationship to the appellant's position responsibilities, Ms. DeGara's probationary status, her very brief employment relationship with the Department, the presence of written policies defining "appointing authority" and the limits of authority vested in each level of management, and the absence of proof that Ms. DeGara relied upon Mr. Scott's representations to her detriment. In the absence of any of those factors, the Board might have reached a substantially different conclusion.

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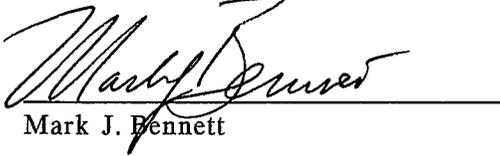
<sup>2</sup> Inasmuch as Ms. DeGara believed that she could not be dismissed without at least two additional written warnings, and suggested using a written warning as the appropriate discipline, Ms. DeGara collaborated in creating the conditions upon which she later claimed she had relied.

Appeal of Rae (LaChance) DeGara  
Docket #95-T-7

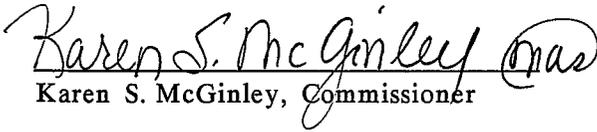
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