

State of New Hampshire



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

Appeal of Peter Fox – Docket #2013-T-001
Department of Safety, Bureau of Emergency Communications
Personnel Appeals Board Decision on Appellant's RSA 541-3 Motion for Rehearing
and
Appellee's Objection to Appellant's RSA 541-:3 Motion for Rehearing
July 25, 2013

On March 18, 2013, the New Hampshire Personnel Appeals Board issued its decision denying the Appeal of Peter Fox, a former employee of the New Hampshire Department of Safety, Bureau of Emergency Communications.

In accordance with the provisions of RSA 541-3, 541:3 Motion for Rehearing. –

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

By letter dated March 28, 2013, Attorney Matthew Lahey filed Appellant's RSA 541:3 Motion for Rehearing, arguing that:

1. The Board upheld the dismissal for reasons not recognized by RSA 21-I:42 – 58 and Per 1002.08 Dismissal;
2. The Board based its ruling on a different issue than that identified during the November 14, 2012 prehearing conference;
3. The Board denied the Appellant the right to a hearing on the merits; and

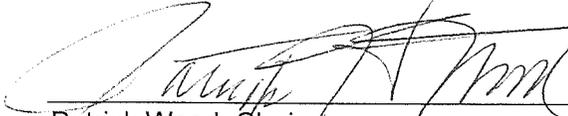
4. The Board's Decision was not based upon any standard and was arbitrary.

On April 3, 2013, Attorney Marta Modigliani filed with the Board Appellee's Objection to Appellant's RSA 541-3 Motion for Rehearing. In support of that Objection, Attorney Modigliani argued that:

1. The list of offenses included in Per 1002.08 of the NH Code of Administrative Rules is not an exhaustive list, and, in light of the facts in evidence, the Board correctly found that the appointing authority was authorized to terminate the Appellant's employment following his six-month unpaid suspension, when the Appellant remained unavailable for work because of two still pending criminal charges for felonious sexual assault against a minor, charges which conflicted with the Appellant's duties as a Telecommunications Specialist and required his removal from the workplace;
2. The parties discussed the issue of staffing hardship at the prehearing conference, and the Board asked the parties to file memoranda on the issue of whether a suspension without pay for purposes of investigation would warrant termination if such suspension extended over a significant period of time when it meant that the Appellant would continue to be unavailable for work, to the detriment of the employer;
3. The material facts were not in dispute, and the Appellant himself had asked for summary disposition of his appeal without a full evidentiary hearing;
4. The Appellant misconstrued the Board's order in that the Board did not say what would or would not have been a reasonable amount of time for the Appellant to resolve the criminal charges against him, but that the appointing authority had advised the Appellant that there would be no more extensions of the suspension, that the Appellant remained unavailable for work due to the nature of the pending charges, that the charges were significant and required the Appellant's removal from the workplace, and that the agency needed to move on to address its own staffing issues.
5. The Appellant ultimately pled guilty to lesser charges of assault, charges which, in and of themselves, would have been sufficient to warrant his dismissal.
6. The Appellant's motion should be denied as the Board's decision was neither unlawful nor unreasonable.

Having carefully considered the Appellant's Motion and the Appellee's Objection in light of the Board's decision and the facts in evidence, the Board voted to DENY Appellant's Motion for Rehearing and to AFFIRM its decision denying the Appeal of Peter Fox.

The New Hampshire Personnel Appeals Board



Patrick Wood, Chair



Philip Bonafide, Vice-Chair

cc: Director Karen Hutchins, NH Division of Personnel, 28 School St., Concord NH 03301
Attorney Matthew Lahey, The Belknap Mill, 25 Beacon Street East, Laconia NH 03246
Attorney Marta Modigliani, Department of Safety, 33 Hazen Drive, Concord, NH 03305

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Department of Safety, Bureau of Emergency Communications

March 18, 2013

The New Hampshire Personnel Appeals Board met in public session on Wednesday, October 24, 2012¹, and Wednesday, November 14, 2012², under the authority of RSA 21-I:58, RSA 541-A:31 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, for prehearing conferences in the above-titled appeal concerning the Appellant's July 6, 2012 termination of employment as a Telecommunications Specialist I. Attorney Matthew Lahey appeared on Mr. Fox's behalf. Attorney Marta Modigliani appeared on behalf of the State. Neither party objected to the members of the Board convened to conduct the prehearing conferences or any later hearing on the merits of the appeal.

While addressing the scope of the hearing at the October 24, 2012 prehearing conference, Mr. Lahey asked the Board to order summary reversal of the termination decision, arguing that an employee can not be dismissed simply because he has been charged with an offense. Ms. Modigliani argued that the Appellant was not dismissed simply because he had been charged with an offense, but that because the nature of the two pending felony charges in relation to the Appellant's duties and responsibilities as an emergency dispatcher required his removal from the workplace by suspension. Ms. Modigliani argued that the decision to dismiss him from that position came after the Appellant had been absent on suspension for approximately six months, which created staffing issues as well a conflict with the Appellant's duties and responsibilities. The Board asked the parties to return on November 14, 2012 for additional discussion on the scope of the hearing.

¹ Board members Wood, Bonafide, Johnson and Casey were present

² Board members Wood and Bonafide were present

At the November 14, 2012 prehearing conference, the Board again heard oral argument on the basis for termination and the proposed scope of the hearing. Mr. Lahey argued that the dismissal was based solely on the nature of the pending charges and that the agency could not present the issue of staffing after the fact to supplement the reasons for termination. Ms. Modigliani argued that the reasons for dismissal were described fully in the letter of termination, including the fact that Per 1002.08 of the Rules is not an exhaustive list but includes reasons that create impediments to the employee being able to report for work, including a lengthy unpaid suspension for pending criminal charges involving a violation of law related to the employees duties and responsibilities. At the conclusion of that discussion, the Board asked the parties to submit memoranda outlining their positions to help the Board understand whether a disciplinary suspension for an extended period of time warranted dismissal. Mr. Lahey's and Ms. Modigliani's written submissions were both received by the Board by the December 19, 2012 deadline.

After reviewing the documents and pleadings submitted, and after considering the oral presentations by the parties, the Board determined that the following facts are not in dispute:

1. Peter Fox was employed as a Telecommunication Specialist I for the Department of Safety in the Bureau of Emergency Communications prior to his July 6, 2012 termination from employment.
2. The Department of Safety learned through a newspaper report on January 21, 2012, that the Appellant had been charged in the Belknap County Superior Court with two counts of Class B felonious sexual assault against a girl between the ages of 13 and 16.
3. On January 25, 2012, having concluded that the nature of the criminal charges against the Appellant conflicted with the Appellant's duties as an emergency 9-1-1- operator, the Department of Safety placed the Appellant on an unpaid suspension. The Appellant did not appeal that suspension.
4. By letters dated January 25, 2012, February 22, 2012, March 19, 2012, April 17, 2012, May 21, 2012, and June 19, 2012, the Appellant was notified that his continued Suspension Without Pay for Purposes of Investigation had been extended for increments of 30 days. Each letter informed the Appellant that if more time was required after the last effective date of suspension "to determine the outcome of the criminal charges, or after the conclusion of the criminal charges in order to evaluate the outcome of those charges in relation to [his] employment, [he would] be contacted."

5. On June 29, 2012, Bruce Cheney, Director of the Bureau of Emergency Communications met with the Appellant, the Appellant's union representative Thomas Wainwright and the Appellant's attorney, Matthew Lahey, to discuss the evidence supporting the Bureau's decision to terminate the Appellant's employment. According to the notice of termination issued to the Appellant on July 6, 2012, when asked for any information that Director Cheney should consider before finalizing his decision, the Appellant indicated that he had pled "not guilty" to the criminal charges and that he intended to proceed to trial, which was then scheduled for September. Mr. Wainwright asked if the Appellant could be placed in another position, but was advised by Mr. Cheney that it was "not a viable option."
6. The Appellant was notified by letter dated July 6, 2012, that he was to be dismissed based on the Director's decision that the pending indictments for felonious sexual assault in relation to the responsibilities as an emergency dispatcher were at least as egregious as conduct described in Per 1002.08(b)(23), which allows an appointing authority to dismiss an employee without prior warning for "violation of a law related to an employee's job duties." The Director further advised that, "[The Appellant's] vacant position is creating a staffing hardship for the Bureau. [The Appellant has] been left on suspension without pay as long as possible. The agency simply has to move on."
7. The Appellant timely filed his appeal with the Board by letter dated July 20, 2012, requesting that the Board order a summary reversal of the termination, arguing there was no basis for his dismissal as a matter of law.
8. By letter dated August 3, 2012, Attorney Marta Modigliani filed the Department's Response along with an Assented To Motion to Stay scheduling of any hearing or prehearing until after September 10, 2012, the Appellant's trial date on the pending criminal charges. The Board granted that request.
9. By order of notice dated August 22, 2012, the Board informed the parties that it had scheduled them to appear for a mandatory prehearing conference on October 24, 2012.
10. By letter dated August 28, 2012, Attorney Lahey advised the Board that the felony charges against the Appellant had been dismissed and that Mr. Fox pled no contest to a misdemeanor simple assault. The attached Return from Superior Court indicated that the Appellant was found guilty of simple assault, that he was sentenced to the House of Corrections for a period of 12 months, and that the entire sentence had been suspended during good behavior and compliance with terms and conditions of that order, including payment of a \$500 fine and a statutory penalty assessment of \$120, as well as completion

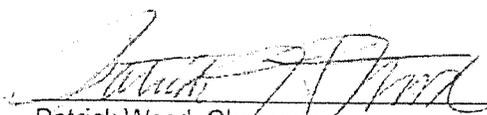
of a psycho-sexual evaluation by a licensed therapist and successful completion of any recommendations.

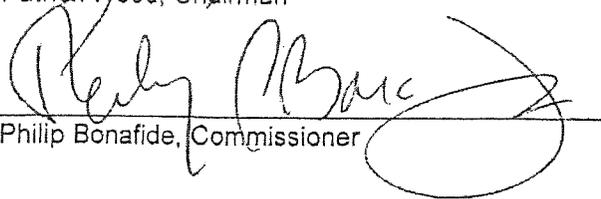
Having carefully considered the parties arguments and written submissions, the Board agrees with the Department that Mr. Fox was given ample opportunity to resolve the issue of the criminal matters. At the meeting with Director Cheney, Mr. Fox basically was told that there would be no more extensions of the suspension – the agency had to “move on.” Mr. Fox was not terminated because of “staffing issues;” he was terminated because the criminal matters had not been resolved. Therefore, the Board rules that the Department had the legal authority to terminate Mr. Fox under these circumstances.

However, in light of the fact that Mr. Fox was under a valid suspension without pay through July 24, 2012, the Board does not agree that a termination of Mr. Fox during that valid suspension was appropriate. If, for example, Mr. Fox had successfully resolved the criminal matters prior to July 25, 2012, it would not be unreasonable to expect that Mr. Fox could have returned to work within that time period. So, the next question to be determined is whether the criminal matters pending against Mr. Fox were resolved prior to July 25, 2012.

According to the record, the criminal matters were resolved in August 2012. Since the reason for the suspension without pay was not resolved prior to July 25, 2012, the Board upholds the dismissal of Mr. Fox as of July 25, 2012, and denies the appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD


Patrick Wood, Chairman


Philip Bonafide, Commissioner

cc: Director Karen Hutchins, NH Division of Personnel
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Attorney Marta Modigliani, Department of Safety, 33 Hazen Drive, Concord, NH.03305