

State of New Hampshire

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**PERSONNEL APPEALS BOARD**

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

APPEAL OF JOSEPH GIFFORD

Docket #90-T-1.  
Response to Appellant's Motion for Reconsideration

May 17, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, May 1, 1991, to review the April 23, 1991 Motion for Reconsideration of the Board's Order dated April 3, 1991, filed by SEA General Counsel Michael C. Reynolds on behalf of Joseph Gifford.

In consideration of the grounds provided by the appellant in support of his Motion, and upon review of the record of this appeal, the Board voted unanimously to deny that Motion and to affirm its decision of April 3, 1991, upholding the appellant's discharge from employment at Friendship House (N.H. Youth Development Center).

The appellant argued in support of his Motion for Reconsideration that the Board should have granted his request for continuance "so the appellant could testify on his own behalf".

As the Board noted in its original order:

"...the parties to this appeal had been provided written notice on January 2, 1991, that the Board had scheduled a hearing on the merits of Mr. Gifford's appeal on Wednesday, February 27th. That notice clearly directed all persons involved in this appeal to be present for the hearing as scheduled, and also notified the parties that any requests for postponement, continuance or special scheduling must be filed in writing and be received by the Board no later than seven calendar days from the date of the scheduling order."

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Docket #90-T-15

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In his Motion for Reconsideration, the appellant argues:

"While the Board found that appellant's proposed findings of fact were 'generally unsupported by the evidence', it is also the case that Mr. Gifford was not present to testify on his own behalf. Thus, in at least 13 of the 30 findings the Board made in its April 3, 1991 decision (namely 7, 8, 9, 12, 14, 16, 18, 19, 20, 21, 22, 27 and 29) Mr Gifford was unable to testify to these facts and contradict the testimony of adverse witnesses, which would then be assessed [sic] for credibility by the Board." (SEA Motion for Reconsideration, April 23, 1991, para. b)

If the Board were to delete those findings from its decision, the outcome of the appeal would have been unchanged. The Board recognizes that Requests for Findings of Fact have no evidentiary value. However, the Board reviewed those requests to determine if the appeal might have had some other outcome had the appellant been present to offer testimony on his own behalf, and had been able to offer credible evidence to support his Requests for Findings of Fact.

The Board concluded that even if it were to have considered each of the appellant's proposed "Findings of Fact" to be essentially true and supported by the testimony which Gifford might have given, those facts would not have resulted in a different outcome.

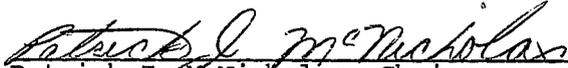
John Biron, the employee who testified that he had given the brownies to the students, did not witness Gifford putting Ex-Lax in the brownies, nor did the appellant allege that Mr. Biron had any direct knowledge of what Gifford may or may not have put in the brownies. House Leader Richard Brown was unaware that the brownies had been tainted with Ex-Lax, nor did the appellant allege that Brown had any direct knowledge of what Gifford may or may not have put in the brownies. The appellant's own requests include admissions that on Monday, July 16, 1990, Mr. Gifford used his own ingredients on his own off-duty time at the YDC to prepare brownies with Ex-Lax in them as a joke for his brother-in-law who was to visit that weekend, and that he left the tainted brownies where they were physically accessible to youth in the care of YDC at Friendship House. Whether or not the residents regularly received permission to remove snacks from the kitchen at Friendship House has no bearing upon the fact that the appellant prepared food laced with a commercial laxative and, whether intentionally or carelessly, left that food where it might be eaten by the residents at Friendship House.

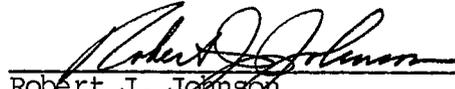
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The appellant offered no grounds upon which the Board might find that its decision was either unreasonable or unlawful, or that for good cause shown, a rehearing might result in a different outcome. Accordingly, the Board voted unanimously to deny the appellant's Motion for Reconsideration, and affirm its decision of April 3, 1991.

THE PERSONNEL APPEALS BOARD

  
Patrick J. McNicholas, Chairman

  
Robert J. Johnson

  
Mark J. Bennett

cc: Lesley Warren, SEA Legal Intern  
Michael C. Reynolds, SEA General Counsel  
Ronald Adams, Superintendent, N.H. Youth Development Center  
Virginia A. Vogel, Director of Personnel  
Civil Bureau - Attorney General's Office

# State of New Hampshire



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## PERSONNEL APPEALS BOARD

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Telephone (603) 271-3261

APPEAL OF JOSEPH W. GIFFORD  
Docket #91-T-1  
New Hampshire Youth Development Center

April 3, 1991

The New Hampshire Personnel Appeals Board (McNicholas, Johnson and Bennett) met Wednesday, February 27, 1991, to hear the termination appeal of Joseph Gifford, a former employee of the New Hampshire Youth Development center. At the time of his discharge from employment, effective August 6, 1990, the appellant was employed as a cook at Friendship House.

Mr. Gifford was represented at the hearing by SEA General Counsel Michael C. Reynolds and SEA Legal Intern Lesley Warren. On the morning before the hearing, Ms. Warren had telephoned the Board's Executive Secretary, indicating that the appellant had just started a new job and would be unable to attend the hearing. She asked for a continuance on his behalf. Ms. Warren's verbal request for continuance was repeated in writing, by letter dated February 26, 1991, in which she stated that **Mr.** Gifford had notified the State Employees' Association late on the afternoon of February 25, 1991, that he had obtained employment out of state, and that his new employer was unwilling to give him time off to attend the hearing. The appellant offered no competent evidence or affidavit, however, to support that claim.

Superintendent Adams stated he had no objection to a postponement, provided however that the "clock" would stop for the purposes of computing back-pay should **Mr.** Gifford succeed in his appeal for reinstatement. He also stated for the record that the Youth Development Center had called in several employees from their regularly scheduled days off to testify at the hearing.

Upon review of its own records, the Board noted that the parties to this appeal had been provided written notice on January 2, 1991, that the Board had scheduled a hearing on the merits of **Mr.** Gifford's appeal on Wednesday, February 27th. That notice clearly directed all persons involved in the appeal to be present for the hearing as scheduled, and also notified the parties that any requests for postponement, continuance or special scheduling must be filed in writing and be received by the Board no later than seven calendar days from the date of the scheduling order.

In light of the fact that the appellant had had nearly eight weeks' notice of scheduling, the Board was unwilling to grant the request for continuance, unless the appellant agreed to waive any claim for back-pay from the original hearing date to any date on which the hearing might be rescheduled. Neither Ms. Warren nor Mr. Reynolds was prepared to make such agreement on his behalf.

In consideration of the foregoing, the Board denied the request for postponement, determining that he could have, or should have, made other arrangements in order to be present as directed. Ms. Warren again objected to going forward without the appellant present. The Board over-ruled her objection, noting it for the record.

Ms. Warren made a motion to have the witnesses sequestered, which the Board granted. The Chairman instructed the witnesses not to discuss their testimony with one another at any time prior to the conclusion of the hearing. The Chairman then instructed the State to present its case.

Those appearing and offering sworn testimony as witnesses for the Youth Development Center included Richard Brown, House Director; John Biron, Youth Counsellor II; and Alan Colon, Youth Counsellor. No witnesses appeared on the appellant's behalf.

The Board, in consideration of the evidence and testimony presented, voted unanimously to affirm the State's decision to discharge Mr. Gifford. The proposed findings of fact presented by the appellant were numerous and generally unsupported by the evidence. The Board found that the proposed rulings could not be readily granted or denied without substantial amendment. Therefore, the Board made its own findings of fact which are presented below in substantially the same sequence as those offered by the appellant.

1. Mr. Gifford was a permanent employee of the Youth Development Center, employed as a cook at Friendship House. No evidence was presented concerning his actual date of hire.
2. During June 1990, following a telephone conversation, Mr. Gifford referred to his supervisor as a "bitch".
3. Mr. Gifford's "bitch" remark was overheard by House Leader Richard Brown.
4. Mr. Gifford suffered no immediate disciplinary action for referring to the supervisor as a "bitch", although Richard Brown spoke with him about the incident and informed him that the remark was inappropriate.
5. No evidence was presented concerning the number of persons who knew, or might have known, about the "bitch" remark. This fact, however, is not dispositive of the instant appeal.

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6. Mr. Gifford admitted to baking a batch of brownies tainted with Ex-Lax on July 16, 1990, which he said were intended as a joke for his brother-in-law who was to have visited him later that week.
7. No evidence was presented to support the appellant's claim that Bob Dorian and Mike McGehan (Friendship House Staff) were in the kitchen at Friendship House when Mr. Gifford baked the tainted brownies.
8. No evidence was presented concerning the amount of Ex-Lax which the appellant added to the batch of tainted brownies.
9. None of those offering sworn testimony saw the "DO NOT TOUCH" sign which the appellant alleges to have placed inside clear plastic wrap covering the brownies which he placed in the refrigerator at Friendship House, although House Leader Brown recalls being told by a staff member that such a sign had been in place earlier in the week.
10. Friendship House Residents were required to get permission from staff before removing snacks from the refrigerator, but it was not uncommon for residents to take snacks from the refrigerator without permission.
11. Students on restriction who were found to violate house policy could be punished by an automatic "dead day".
12. The appellant's allegation that staff permission to remove snacks from the refrigerator was rarely given was unsupported by the evidence.
13. Mr. Gifford, regardless of the reason, did not take the tainted brownies home with him.
14. Mr. Gifford left for vacation from July 20 to July 29, 1990, leaving the tainted brownies in the refrigerator. On or about Tuesday during the week before his vacation, John Byron asked if the brownies in the refrigerator could be given to the residents. There was no note saying "Do Not Touch". Mr. Gifford said he didn't care if the residents were given the brownies. During that same week, Alan Colon asked if Gifford intended to bring the brownies home. Gifford told him no, and said he didn't care if staff gave them to the residents.
15. There was no cook on staff at Friendship House during the week of Mr. Gifford's vacation, and the residents were to take their meals at the main building.
16. Mr. Gifford informed at least two staff members that it was all right if staff gave the brownies to the residents.

17. On July 19, 1990, John Byron put the brownies which Gifford had baked out on the dining room table at Friendship House for the evening snack at approximately 8:00 p.m.
18. None of the witnesses corroborated Mr. Gifford's allegation that the "Spic" incident occurring in July 1990, arose from Mr. Gifford's attempts to reason with a Hispanic resident.
19. None of the witnesses corroborated Mr. Gifford's allegation that his remark to the student was misunderstood, that he had not used the epithet "Spic", or that he had said to the Hispanic resident, "I'm not Dick".
20. Same as #19.
21. Mr. Gifford was not immediately disciplined for allegedly calling one of the Hispanic students a "Spic", nor was it confirmed by any person that he had instead said "I'm not Dick [Brown]. "
22. Same as #21.
23. Mr. Gifford was discharged on August 6, 1990.
24. In addition to discharge for baking the tainted brownies and leaving them in Friendship House, the letter of termination did cite the "bitch" and "Spic" incidents as further justification for Gifford's termination.
25. That Mr. Gifford regrets calling his supervisor a "bitch", or that he did not believe he was overheard has little bearing upon the propriety of its consideration in the decision to discharge him from employment.
26. Mr. Gifford's apologies for his offense have no bearing upon the fact that his actions caused several students and a staff member to become ill. The record reflects that Mr. Gifford knowingly offered the tainted food to staff, and authorized its distribution to residents, with full knowledge that the food was tainted with an over-the-counter laxative.
27. Inasmuch as the "Spic" incident is not the sole basis of YDC's decision to discharge Mr. Gifford, his memory of the incident, particularly when his version of the incident is uncorroborated by competent evidence, is not dispositive of the appeal.
28. Any hardship which Mr. Gifford may have incurred either financially or psychologically as a result of his being discharged has no bearing upon the propriety of the discharge decision itself.

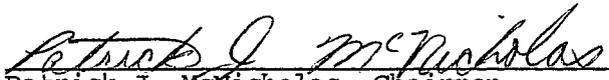
29. There is no evidence to support **Mr.** Gifford's allegation that other YDC employees were as or more irresponsible than he. **Mr.** Gifford's own actions in offering the tainted brownies to co-workers at Friendship support the finding that the staff did not believe he had actually baked Ex-Lax into the brownies which he left in the refrigerator and later approved for distribution to the residents.
30. **Mr.** Gifford was discharged effective August 6, 1990, one week after his scheduled return from vacation.

The Board ruled as follows on the appellant's proposed rulings of law:

1. Denied. The Rules neither define "immediate", nor do they provide that if the appointing authority does not "immediately" discharge the employee that the agency is then barred from implementing a termination without first issuing one written warning.
2. Denied. The earlier alleged offenses may be considered an integral part of termination under the optional discharge provisions of the Rules of the Division of Personnel.
3. Denied. The appellant received notice that the offenses in question were considered when the appointing authority decided to discharge him. His appeal addressed both issues, so to say that he has been given neither notice of the offenses nor an opportunity to appeal such offenses is patently absurd.
4. Granted, assuming however that the Rule cited by the appellant, Per 308.03 (e), was actually intended to be Per 308.03 (4) (e). However, inasmuch as the appointing authority never attempted to claim that the letter of termination served as notice of ".2 written warnings for the same offense" or "4 written warnings for various offenses", or that the letter of termination would serve as the third or fifth warning leading to discharge, the ruling is not dispositive of the appeal.
5. Granted, as discussed above in #4.
6. Granted, assuming however that the Rule cited by the appellant, Per 308.03 (e) was actually intended to be Per 308.03 (4) (e). However, inasmuch as the appointing authority never attempted to claim that oral warnings could be substituted for written warnings under Per 308.03 (4)(e), the ruling is not dispositive of the appeal.
7. Granted.
8. Neither granted nor denied. The proposed ruling is vague, and its meaning within the context of the instant appeal is unclear.

9. Denied.
10. In consideration of the appellant's duties in his capacity as cook for the residents of Friendship House, and his responsibilities for the health and well-being of children under the control of the Youth Development Center, the offense he committed in producing foodstuffs tainted with an over-the-counter laxative, offering those foodstuffs to staff, and allowing co-workers to offer such foodstuffs to Friendship House residents is an offense best described as a mandatory discharge offense under Per 308.03 (a) (1)b. and e.

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