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State of New Hampshire

PERSONNEL APPEALS BOARD
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APPEAL OF RICHARD HALLE
Docket H89-T-20
Response to State's Motion for Reconsideration;

Appellant's Contingent Motion for Reconsideration and Rehearing And Motion for Clarification

June 5, 1990

The Personnel Appeals Board (McNicholas, Cushman and Bennett), met Wednesday, May 16, 1990, to review the above-filed motions in the appeal of Richard Halle, a former employee of the Department of Corrections who was reinstated by Board order dated February 1, 1990. In reviewing the State's Motion, the Board voted to affirm its earlier order in this matter, noting that all the arguments raised by the State in its Motion for Reconsideration were fairly raised in the original hearing on the merits, and considered by the Board in its deliberations.

The State's Motion repeatedly raises the issue of burden of proof. The State is certainly correct that in appeals of disciplinary action, the employee bears the burden of proof. The State, however, is equally responsible for providing evidence that the action giving rise to the appeal was accomplished in accordance with Rules of the Division of Personnel.

The State relies heavily upon the provisions of its internal policies to justify the immediate discharge of the appellant. In so doing, the State points to the review and approval of those policies by the New Hampshire Division of Personnel, as well as the review of such policies by the ACA audit team, and the subsequent accreditation of the prison facility. Even upon questioning by the Board, however, the State failed to demonstrate that the policy in question had ever been fully implemented, or evenly applied to all employees of the agency.

Therefore, the Board affirms its decision that Mr. Halle's discharge without warning was inappropriate, and should be reduced to a one month suspension without pay under the terms and conditions established in the Board's order of February 1, 1990.

As to Appellant's request that the Board eliminate the rental charges, or in the alternative, order repayment consistent with the cost of purchasing similar equipment, the Board denies such request. Appellant could have completely avoided any disciplinary action had he chosen to contract for long-term rental or outright purchase of tools and/or equipment which he removed from the prison for his personal use. As the Board found in its previous order, "Mr. Halle admits to removing the Department owned sawzall for his personal use. During direct and cross-examination, Mr. Halle admitted that he had limited use for such a tool, and therefore would not have been inclined to purchase one. When asked what steps he might then take to secure such a tool for short-term use, he replied he would attempt to borrow one. In the alternative, he admitted that the only other option would have been to rent such a tool." (Appeal of Richard Halle, Docket #89-T-20, PAB Decision, February 1, 1990, page 6) Given his assertion that his need for the sawzall and off-set drill was limited, there is no basis now to provide for payment at the rate of an outright purchase, or a long-term contractor's rate for rental.

Regarding Appellant's request that the Board reduce the discipline to an oral warning at most, the Board refers Appellant to its decision of February 1, 1990, page 5: "The plain facts of this appeal are that Mr. Halle knowingly utilized property legally belonging to the New Hampshire Department of Corrections for his personal use and/or profit, and that he did so without the approval of his supervisors. Were the Board allowed the luxury of reviewing this case in a vacuum, it might conclude that Mr. Halle's termination for stealing from the state was justified."

Appellant's Contingent Motion offers a stipulation that the Motion for Reconsideration and Rehearing will be withdrawn if the Department of Corrections immediately accepts the Board's February 1, 1990 decision, reinstates Mr. Halle, and begins good faith compliance with the Board's order. The Board so directs the Department of Corrections, and expects full and immediate compliance with its February 1, 1990 order. The Board therefore notes for the record that under the terms offered by Appellant, his Contingent Motion is considered to be withdrawn.

In his February 21, 1990 Motion for Clarification, Appellant states, "It is also my understanding that the Department of Corrections may interpret the Board's February 1, 1990 decision as not mandating that Mr. Halle be returned to the job from which he was terminated. The Department may therefore place Mr. Halle in a different position, most likely undesirable to Mr. Halle. It is my understanding of the Board's reinstatement order that Mr. Halle is to be returned to his former position. ... I further request that the Board order Mr. Halle's immediate reinstatement; and that said order specify that the reinstatement is to take effect pending any further appeal by the Department of Corrections, including any such appeal filed with the New Hampshire Supreme Court."

Mr. Halle is to be returned immediately to the same position from which he was terminated, and the date of reinstatement is to be made consistent with the Board's February 1, 1990 order. However, the Board is cognizant of the authority vested in management'under the terms of Per 302.05(b) of the Rules of the Division of Personnel "...to determine who and when employees are to be transferred, keeping in mind that they can be made only for the best interests of the agency. Such transfers are subject to appeal to the [board] by the employee affected if he feels that the transfer was made for some other reason."

Appellant shall be entitled to any back pay and benefits which are consistent with the terms of the Board's original order. Any reduction in back pay by the amount of earnings from other employment shall not apply to any period of time following the first day Appellant made himself available for work, but for which the Department refused to implement the reinstatement order.

THE PERSONNEL APPEALS BOARD

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Mark J. Bennett

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APPEAL OF RICHARD HALLE
Docket #89-T-20

dated: February 1, 1990

A quorum of the New Hampshire Personnel Appeals Board (McNicholas and Cushman)[1] met Wednesday, January 24, 1990, to hear the termination appeal of Richard Halle, a former employee of the New Hampshire Department of Corrections (Correctional Industries). Mr. Halle was represented by SEA General Counsel Michael C. Reynolds. Staff Attorney Michael K. Brown represented the Department of Corrections.

The record of the appeal consists of three audiotapes of the day's hearing; Appellant's Exhibits A through G; State's Exhibits 1 - 7; Appellant's June 29, 1989 letter of termination; Appellant's July 11, 1989 letter of appeal; the Board's July 12, 1989 notice of docketing, December 28, 1989 notice of prehearing conference, and January 5, 1990 notice of scheduling; and the State's January 8, 1990 notice of agreement between the parties that no prehearing conference would be required prior to hearing the case on the merits.

Before receiving testimony or evidence, Chairman McNicholas asked if either party objected to any member of the Board hearing the case. Neither party objected. In other preliminary matters, Appellant objected to the introduction of statements by George Mills (State's Exhibit #3), Greg Perkins (State's Exhibit #4) and any hearsay testimony concerning John Green. Attorney Brown responded that hearsay is admissible under the Board's procedural rules, and that requiring Mills or Perkins to be present at the

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1 The Board had allowed three hours for the hearing, as requested by the appellant. The hearing, however, exceeded the allotted time by approximately three hours. Commissioner Bennett participated in the hearing until 1:00 p.m., when he had to leave because of a previously scheduled commitment. Having heard only a portion of the testimony, Commissioner Bennett did not participate in deliberations or the final decision in this matter.

hearing for the purpose of giving live testimony would require closing down the prison shop for the day. He also argued that Attorney Reynolds had been aware for months that discoverable materials were available at Attorney Brown's office, that the statements in question would be introduced, that Attorney Reynolds had had access to statements themselves since January 19th, and that Attorney Reynolds had had ample opportunity to interview those individuals whose statements were to be admitted into evidence.

The Board delayed ruling on the objection until the statements were about to be offered as evidence. The Board eventually admitted that material into evidence, overruling Attorney Reynolds' objection.

The State argued that Mr. Halle had "stolen" property belonging to the Department of Corrections, and had admitted to stealing the property during the course of an investigation into those alleged thefts. The State therefore concluded that discharge of Mr. Halle from his position as Plate Shop Manager was mandatory under the provisions of Per 308.03 (1) (c): "Mandatory discharge. Immediate discharge is mandatory without warning in cases such as, but not necessarily limited to, those listed below, provided that the offense in question is clearly established. ... Stealing from the state or any other employee."

Attorney Brown referred the Board to RSA 637:3 I of the Criminal Code:

> "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."[1]

Appellant's representative argued that Mr. Halle was being made the scapegoat for "sloppy, slovenly rules", that Rule H from the Department of Corrections Employee Information Booklet (State's Exhibit #1) does not warn of automatic discharge, that there must be some reasonable warning to an employee like Mr. Halle before discharge.

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1 "'Purpose to deprive' means to have the conscious object: (a) to withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or the use and benefit thereof, would be lost; or (b) to restore the property only upon payment of a reward or other compensation; or (c) to dispose of the property under circumstances that make it unlikely that the owner will recover it." [RSA 637:2 III]

Allegations of theft

Sump pump:

According to the testimony, Mr. Halle needed a sump pump for use at a private construction site, and asked his co-workers if any of them had a sump pump he could borrow. None was available for loan by his co-workers, and James Elliot, Mr. Halle's subordinate, suggested that there might be a spare sump pump in the maintenance department which he could borrow. The pump loaned to him by maintenance did not work for his purposes, and it was returned. Mr. Elliot then located several sump pumps in the basement of one of the shop areas, cleaned one, refitted it, and attached to it a length of hose. Mr. Elliot reported it as being "good as new".

That pump was given to Mr. Halle to take to the construction site, where it was temporarily installed in a dug well to pump water to a camper trailer in which Alden M. Beauchemin, Halle's future son-in-law, was residing during the construction of his house on the same site. After the house was built and a shallow-well pump had been installed for the house's water system, the foundation drains at Beauchemin's house malfunctioned, and the basement filled with water. The sump pump was then used to drain the basement. The sump pump, a submersible, portable unit, was never permanently installed in the house. The pump was in the possession of Alden Beauchemin for a period of 6 to 9 months.

During the testimony of James P. Hooker, Plate Shop Manager (Correctional Industries), Appellant's counsel agreed to stipulate that Mr. Halle had taken the sump pump from the prison for his personal use, and that this item had been used on a Northfield construction site located on property belonging to Alden M. Beauchemin.

Offset drill:

During the preparations for ACA accreditation at the Department of Corrections, the staff from the various prison shops removed a number of items which had been declared surplus and had moved them to the White Farm (the State's surplus property facility). While Mr. Hooker was transporting items to the White Farm, Halle asked him to look for an off-set drill. He told Hooker that if he found a good one, he should sign it out to the plate shop and bring it to Halle. Hooker did, in fact, locate an off-set drill, signed it out as property intended for the plate shop, and brought it to Halle. The drill was not, however, immediately placed in the shops tool inventory, but was given directly to Halle for use at the Beauchemin construction site.

Appellant's counsel agreed to stipulate that Mr. Halle had taken the off-set drill from the prison for his personal use, and that this item had been used on the same construction site for a number of months.

Sawzall:

The inventory of tools in the prison included a sawzall, which Mr. Halle took from the prison to use at the Beauchemin construction site in Northfield. James Hooker testified that he remembered Halle "checking it out and then it was gone". Appellant's counsel again agreed to stipulate that Mr. Halle had taken this item from the prison for his personal use, and that this item had been used on the same construction site for a number of months.

Nuts and bolts:

One of the projects to which inmates were assigned was the packaging of nuts and bolts for Whitney Screw of Nashua, N.H. Mr. Elliot testified that James Surette of Whitney Screw had given him the authority to "dispose of miscellaneous nuts and bolts". Nuts and bolts, and other metals, had been disposed of in the dumpsters. In an attempt to tighten security during the ACA accreditation process, Mr. Elliot and others, including Mr. Halle, had taken certain metal items to their homes, including the so-called miscellaneous nuts and bolts left over from the Whitney Screw project. Mr. Elliot believed himself to have the authority to determine how to dispose of these materials, and believed there was nothing wrong with giving the nuts and bolts away to his friends or co-workers.

Relevant policies and procedures

Mr. Elliot testified that at the time of the alleged thefts there were no policies or procedures in place addressing equipment or tool inventory and control, except those procedures adopted by Mr. Elliot and tacitly approved by Warden Cunningham. According to Elliot, most of the shop employees had, at one time or another, borrowed tools or equipment from the Prison for their personal use. He said that "A lot of guys do it" and that "It happens all the time now". He said that "Welding machines have left the institution". When asked if such use was a commonly known fact, he answered "I'm the guy who gave Dick permission to take those things". He claimed that the borrowing of tools and equipment was on a man's "honor" and that as the person in charge of tool and equipment inventory and control, he merely needed to know who had Corrections property and where it could be located if needed.

Mr. Elliot admitted to having seen State's Exhibit #5 (Tool and Equipment Control Policy/Procedure) or something very similar to it. He also indicated that there were so many policies and procedures in the Department of Corrections, it was impossible to be familiar with all of them. When asked what in that policy authorized him to release tools or equipment for personal use outside of the institution, Mr. Elliot quoted from State's Exhibit #5, section J., last paragraph:

> "Nothing in this Policy and Procedures Directive is intended to preclude work site supervisors from being responsible for maintaining a constant awareness of the locations and usage of tools and equipnent in/on their particular work site."

When asked what sort of log or record was maintained of "borrowed" tools and equipnent, Mr. Elliot insisted that since he was personally responsible for tools and equipment, he did not have to maintain such a record, but merely needed to be "aware" of borrowed tools and equipnent, and to have given his permission for such "borrowing" in advance.

Employee work record

Appellant argued, on the basis of his Exhibits A through G (photocopies of performance appraisals, letters of commendation, and notice of certain training) that he had been an exemplary employee throughout the course of his employment with the Department of Corrections. Attorney Brown agreed that Mr. Halle had an outstanding work record, but argued that such record had no bearing upon the instances of stealing from the State, or upon the State's obligation to enforce the provisions of Per 308.03 and discharge Mr. Halle from his employment.

Conclusions

The plain facts of this appeal are that Mr. Halle knowingly utilized property legally belonging to the New Hampshire Department of Corrections for his personal use and/or profit, and that he did so without the approval of his supervisors. Were the Board allowed the luxury of reviewing this case in a vacuum, it might conclude that Mr. Halle's termination for stealing from the state was justified. However, the record of the appeal, when reviewed in light of an apparent long-standing departmental practice in Corrections of allowing employees access to State-owned property for their personal use or profit, will not easily support such conclusion.

Mr. Halle's June 29, 1989 letter of termination claims to discharge him for an admission of stealing a sump pump, sawzall, off-set drill, and nuts and bolts. The Board found information relating to the sump pump and nuts and bolts to be least damaging to the appellant. From the testimony of both Mr. Hooker and Mr. Elliot, the Board concluded that the sump pump taken by Mr. Halle had not been in use by the Department, nor was it even functional when Mr. Elliot retrieved it from the basement and repaired it for Mr. Halle's

use. There was no indication that Mr. Halle instructed or coerced Mr. Elliot to find or repair the pump. While it is apparent that Mr. Elliot misused State property and paid work time for his supervisor's personal benefit, there is no evidence that Mr. Halle induced him to find or repair the pump. Mr. Halle bears some responsibility for allowing staff he supervised to engage in personal projects on state time, and perhaps should have been disciplined for same. Such failure, however, does not constitute "stealing" in the Board's opinion.

Regarding the nuts and bolts, the State provided no evidence that those materials were the property of the Department of Corrections. In the absence of contradictory testimony or evidence, the Board must find that the nuts and bolts were the property of Whitney Screw, and that Whitney Screw had in some fashion authorized Mr. Elliot to dispose of the surplus as he deemed appropriate. It appears from the testimony that numerous employees of Correctional Industries took the surplus for their personal use at the suggestion of Mr. Elliot and/or Mr. Halle. The Department of Corrections appears to have had required the removal of certain materials during the ACA accreditation process, but appears to have provided no policy or procedure for same. Mr. Halle certainly bears some responsibility for failing to ascertain the appropriate method for disposal of the miscellaneous or surplus nuts and bolts. Such failure does not, in the Board's opinion, constitute stealing.

Mr. Halle admits to removing the Department owned sawzall for his personal use. During direct and cross-examination, Mr. Halle admitted that he had limited use for such a tool, and therefore would not have been inclined to purchase one. When asked what steps he might then take to secure such a tool for short-term use, he replied he would attempt to borrow one. In the alternative, he admitted that the only other option would have been to rent such a tool. Although Mr. Halle admits to having had the sawzall in his possession and control for a length of time, there is insufficient evidence to support a finding that his intent was theft, within the statutory meaning of the word.

The most damaging evidence against Appellant was the testimony concerning Mr. Halle's acquisition of the off-set drill. While the Board can accept that Mr. Halle might have found a use for the off-set drill in the plate shop, it appears that his initial purpose in having Hooker locate and sign-out the off-set drill from the White Farm was for Halle's personal use. Given the absence of evidence that Halle intended to keep the drill, the Board again can not conclude that his intent was to "steal" from the Department of Corrections.

Other ısi ati

Despite the presence of Policy and Procedure Directives related to Tool and Equipment Inventory Control, the Board found little evidence that Correctional Industries offered more than lip-service to such controls. The Board was frankly appalled that a correctional institution housing an admittedly dangerous population would pay so little heed to the whereabouts of any equipment or materials which might be used to produce weapons or effect an escape. A loosely constructed "code of honor" binding the employees of Correctional Industries can hardly be construed as an effective system of checks and balances for the protection of the inmates, the staff, and the general pubic. While ACA accreditation of the facility is laudable, it in no way proves that the controls established for such accreditation are consistently utilized or enforced.

The Board found the investigation into alleged "thefts", both prior to and subsequent to Mr. Halle's discharge, fell short of the mark in assessing how widespread the practice of "borrowing" might have been during any period of time, especially during the six to nine month period of alleged thefts by Halle. State's witness Landry admitted to asking John Green if he had ever authorized any of his employees to remove equipnent or tools from the prison for their personal use. He responded in the negative. Sgt. Landry then admitted that she asked no follow-up questions, such as, "Were you aware of any 'borrowing' of equipment or tools?" or "Did you ever discipline employees for unauthorized use of State property?". She also offered her observation that Mr. Halle appeared to have intended to return the tools, but had kept them longer than he thought he would.

The Board had little choice but to conclude that the investigation as conducted, and as reported to the Board, may have proven Mr. Halle guilty of misappropriation of State property, but did little to put such activity into any context which would support immediate discharge without warning.

ORDER FOR REINSTATEMENT

Based upon all the evidence before it, the Board voted to order that Mr. Halle be reinstated effective July 28, 1989, with the four week period between June 29, 1989 and July 27, 1989 being treated as a one-month suspension without pay, and a warning that any further, proven instances of misappropriation of state owned property subsequent to reinstatement would be sufficient cause for immediate discharge.

The Board took a number of factors into consideration before determining how to reasonably address the issue of back pay. First, the employee ultimately responsible for adherence to and enforcement of departmental policies and procedures within the plate shop was Mr. Halle. Appellant's argument that Mr. Halle's subordinate, Mr. Elliot, could authorize the removal or long-term use of departmental property for the personal benefit of the employees of the plate shop is, at best, ludicrous. Further, while the practice of borrowing state owned property, or utilization of state facilities for personal gain might have been widespread, the Board is hard-pressed to accept that any other employees took advantage of those practices to the extent, or for such extended periods of time as did the appellant.

Mr. Halle gave no indication that he had, in his capacity of Plate Shop Manager, ever made an effort to keep abreast of any policy or procedure changes, or to ensure that his subordinates were aware of same. The Board found that he could not claim ignorance of the requirements as an absolute defense, since his position required him to be aware of and informed about such requirements.

Based upon the foregoing, the Board voted that the award of back-pay upon reinstatement shall be reduced by reasonable rental charges for the sawzall and off-set drill, calculated on the daily rate of $16.50 for the sawzall and $19.80 for the off-set drill (as quoted January 29, 1990 by' Taylor Rental, Concord, New Hampshire) for a period of three months, or $1105.50/month x 3, or $3,316.50. The award of back-pay shall further be reduced by the amount of unemployment compensation or wages earned during the period of June 19, 1989 to the present, consistent with the provisions of RSA 21-I:58 I.

THE PERSONNEL APPEALS BOARD

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