

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Russell Hobby

Docket #2007-T-020

Department of Safety

May 30, 2008

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, March 26, 2008, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Russell Hobby, a former employee of the Department of Safety, Bureau of Emergency Communications. Mr. Hobby, who was represented at the hearing by Thomas A. Tardif, was appealing his February 28, 2007 termination from employment for being absent for three or more consecutive workdays without proper notice or adequate reason. Attorney Marta Modigliani appeared on behalf of the Department of Safety

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits:

1. May 10, 2004 Letter of Warning
2. May 10, 2004 Letter of Warning (revised)
3. November 15, 2005 Letter of Warning
4. January 11, 2006 Reissued Letter of Warning
5. Letter of Warning Issued March 27, 2006
6. Letter of Dismissal dated July 27, 2006
7. Supplemental Job Description Executed January 12, 2007

8. February 9,2007 Notice of Pre-Disciplinary Meeting
9. February 28,2007 Notice of Dismissal (With Attachments)
10. February 12,2007 Letter from Mr. Hobby to Director Cheney

Appellant's Exhibits¹:

1. February 26,2007 Written Warning/Dismissal
2. February 28,2007 Written Warning/Dismissal
3. January 2,2007 Supplemental Job Description (admitted as modified – omitting editorial reference by appellant)
4. January 12,2007 Form A-4M (01/06) (admitted over State's objection to relevance)
5. January 18,2007 Letter Re: Request for Travel Reimbursement (admitted over State's objection to relevance)
6. January 25,2007 Department of Safety "Personnel Action" form
7. February 2003 Performance Summary
8. March 2004 Performance Summary
9. April 2005 Performance Summary
10. Excluded
11. January 26,2006 PAB Order Re: Docket #2007-T-006
12. Excluded
- 12-A. January 26,2007 Letter from PAB to Tardif and Modigliani Re: Appellant's Motion for Contempt
13. August 16,2004 Letter from Director Cheney to SEA
14. April 26,2006 Letter Re: Investigation

¹ Ms. Modigliani objected to admission of the following exhibits, arguing that they were not relevant to the instant appeal: Appellant's #3, #4, #5, #7, #8, #9, #10, #12, #14. After considering the objection and the Appellant's response, the Board admitted all but Exhibits #10 (State's June 10,2007 Objection to Appellant's Motion for Summary Judgment with attachments) and Exhibit #12 (tape recording of Appellant's January 10,2007 termination hearing), finding that they were not relevant to the instant appeal.

The following persons gave sworn testimony²:

Timothy Scott, Systems Development Specialist IV

Michael Geary, Administrative Operations Manager

Bruce Cheney, Director, Division of Emergency Services

Russell Hobby, former Data Control Clerk III

At the conclusion of the hearing, Mr. Tardif submitted a document titled "Memorandum of Law." That document, and the Department's Reply Memorandum of Law and Objection to Appellant's Memorandum of Law will be addressed in the body of the decision below.

Position of the Parties:

The termination letter issued to Mr. Hobby on February 28, 2007, cited two discrete bases for termination: 1) Absence for a period of three or more consecutive working days without adequate notice or acceptable reason in violation of Per 1002.08(b)(15), and 2) Receipt of a fifth written warning for various offenses within a period of five years, as set forth in Per 1002.08(c)(2).

Mr. Tardif argued that the appellant did not have five valid warnings in his file on the date of termination, and that the State should not have been allowed to rely on those warnings until all challenges and appeals were complete. Mr. Tardif also argued that the State violated the Board's reinstatement order, given orally at the hearing of January 10, 2007 following Mr. Hobby's original termination appeal. Mr. Tardif argued that the appellant believed the Board had ordered him to return to work at his original work location in Laconia, and that the department's decision assigning the appellant to work in Concord was made solely for the purpose of creating conditions of employment that were

² The Board granted the Appellant's request to have the witnesses sequestered. Although Mr. Cheney and Mr. Hobby were expected to testify, both were allowed to remain in the hearing room throughout the testimony, as Mr. Hobby was a party to the appeal, and Mr. Cheney was the appointing authority's representative in this matter.

so untenable that the appellant would have no choice but to resign. Finally, Mr. Tardif argued that the appellant was not absent without appropriate notice or adequate reason on or after February 5, 2007, as the appellant called the agency on February 5, 2007, advising the agency that he would be absent indefinitely due to illness.

Ms. Modigliani argued that the State was entitled to rely on each of the warnings issued to the appellant, regardless of their status on appeal, and that the appellant was subject to dismissal for having received five written warnings for various offenses within a period of five years. She also argued that when the appellant called in on February 5, 2007, he did not indicate that he was ill but that he did not want to commute to Concord and had decided to quit. She argued that the appellant failed to respond to a request from the agency about his intention to resign, and that beginning on February 6, 2007, and for all scheduled workdays thereafter, until the date of termination, the appellant was absent without appropriate notice or adequate reason.

Scope of the Hearing:

On the date of termination, and on the date of hearing with respect to an appeal of that termination, a decision of the Board on Docket #2007-D-003, one of Mr. Hobby's five written warnings, was still outstanding. As such, the Board decided to limit the scope of the March 26, 2008 hearing to the question of whether or not Mr. Hobby had been absent without appropriate notice or adequate reason for three or more consecutive working days, and if so, whether or not those absences warranted his termination from employment. If the Board were to find that the appellant's absences did not violate the provisions of Per 1002.08(b)(15), the appellant would still be able to challenge the propriety of dismissal as a result of his having received five written warnings within a period of five years.

Appellant's Memorandum of Law and State's Reply Memorandum of Law and Objection to Appellant's Memorandum of Law

Mr. Tardif argued that the appellant believed that the Bureau of Emergency Communications in general and Mr. Geary in particular had engaged in a course of "Constructive Dismissal" since 2003, culminating in the appellant's termination from employment effective February 28, 2007. In his Memorandum, the appellant asserts numerous facts not in evidence regarding the appellant's tenure as an employee of the Bureau of Emergency Communications, including the appellant's prior warnings for failure to meet the work standard, his involvement in sexual harassment investigations within his agency, his claims for workers compensation, claims of retaliatory treatment, and arguments that the appellant was the victim of gender discrimination. Inasmuch as those arguments extend beyond the scope of the hearing, the Board has limited its discussion to the instant appeal and the facts in evidence as presented by the parties.³

To the extent that the Appellant's Memorandum and the State's Reply Memorandum and Objection address the specific facts related to Mr. Hobby's reinstatement and his subsequent dismissal for being absent for three or more consecutive working days without appropriate notice or adequate reason, the Board has treated the statements as requests for findings of fact or rulings of law. To the extent that those requests are consistent with the Board's decision below, they are granted. Otherwise, they are denied.

After carefully considering the evidence and argument offered by the parties, the Board made the following findings of fact and rulings of law:

³ The Board notes that there are various forums, including the Department of Labor and the NH Human Rights Commission, that are available to the appellant to address issues beyond the scope of the Personnel Rules.

Findings of Fact

1. The appellant, Russell Hobby, was hired by the Bureau of Emergency Communications as a Data Control Clerk III on March 1,2002. (Agency timeline)
2. The Bureau terminated Mr. Hobby's employment on July 27,2006, for allegedly falsifying official documents related to a complaint of sexual harassment. (State's Exhibit 6)
3. Following Mr. Hobby's timely appeal of that termination, and after several preliminary meetings and prehearing conferences, the Personnel Appeals Board convened a hearing on the merits of the termination appeal on January 10,2007. (Appellant's Exhibit 11)
4. At that hearing, the Board concluded that there was insufficient evidence to support Mr. Hobby's termination from employment for willful falsification of agency records, but that the appellant's conduct warranted an extended suspension without pay. The Board directed the agency to reinstate the appellant. (Appellant's Exhibit 11)
5. As a result of a hiring freeze, Mr. Hobby's previous position was "frozen" and no positions of Data Control Clerk III were available in the Bureau of Emergency Communications. (Geary and Cheney testimony)
6. With the assistance of then Director of Personnel Karen Levchuk, the agency received approval from the Governor's Office to "unfreeze" a position of Data Control Clerk III in order to effect Mr. Hobby's reinstatement following suspension. (Geary and Cheney testimony)
7. After receiving notice of the Board's decision reinstating the appellant at the hearing on January 10,2007, Director Cheney decided to assign the appellant's position to the Concord office, where Mr. Hobby could receive additional training and closer supervision. (Cheney testimony)
8. Timothy Scott, who was assigned to supervise the appellant, spoke to Mr. Hobby by phone on January 11,2007, to schedule a "return to work meeting." Mr. Hobby asked and received permission to bring an Employee Assistance Program representative with him to the meeting, which was scheduled for the following day. (Scott testimony)

9. Michael Geary, Russell Hobby, and a representative of the Employee Assistance Program met in the conference room at the PSAP (Public Safety Answering Point) office in Laconia on January 12, 2007, to address Mr. Hobby's return to work. (Scott testimony)
10. Mr. Scott told Mr. Hobby that whatever the reason for Mr. Hobby's extended absence, it was Mr. Scott's intention to start "with a blank slate" and ensure that Mr. Hobby had the training and support he needed to successfully make the transition back to work. (Scott testimony)
11. At the meeting, Mr. Scott and Mr. Geary informed Mr. Hobby that the Data Control Clerk III position to which he was being assigned would report to the office in Concord, where he would have access to IT personnel and could be assisted through the training by another Data Control Clerk III, Mr. Guay. (Scott, Geary and Cheney testimony)
12. At the January 12th meeting, Mr. Hobby received and signed a Supplemental Job Description indicating that the position itself would be located at the Concord facility. Mr. Hobby did not question or object to being assigned to the Concord office. (Hobby, Geary, and Scott testimony, and Appellant's Exhibit 3)
13. The appellant's assignment to Concord was confirmed in a letter dated January 18, 2007 from Mr. Geary to Mr. Hobby concerning the appellant's request for travel reimbursement. In that letter, Mr. Geary wrote, "You were informed in the morning of January 12, 2007, that your official headquarters would be in Concord, NH, and not the Laconia office that you are temporarily assigned to." (Appellant's Exhibit 5)
14. For the first two weeks following his return to duty, Mr. Hobby was directed to report to the Laconia office. Toward the end of that two-week assignment, Mr. Hobby told Mr. Scott that he would be happy to remain in Laconia. (Scott testimony)
15. Mr. Hobby never complained to Mr. Scott about being assigned to Concord, although Mr. Scott knew that Mr. Hobby had arranged to meet with union representatives to decide whether or not to challenge the assignment of work location. (Scott testimony)
16. When Mr. Scott spoke directly to Mr. Hobby about the issue and asked whether or not Mr. Hobby was going to object to the assignment, Mr. Hobby reported that his

- union representatives had convinced him to try working in Concord before objecting to the assignment. (Scott testimony)
17. Mr. Hobby worked four days in the Concord office before calling in sick on Friday, February 2, 2007. He did not reach Mr. Scott directly, as Mr. Scott was out that day as well. (Scott testimony)
 18. On Monday, February 5, 2007, Mr. Hobby called Mr. Scott, telling him that the drive to Concord was too much, and he had decided to "get through." Mr. Scott told the appellant that if he was resigning from his position, he should submit something in writing. Mr. Scott said that he could either drop off a letter at the Laconia office, or he could send it to Mr. Scott by email. (Scott testimony)
 19. The following day, there was no message of any kind from the appellant, so Mr. Scott tried to reach the appellant by telephone. Mr. Scott reached the appellant's answering machine, where he left a message to tell the appellant that if he was resigning, he needed to submit a written resignation. (Scott testimony)
 20. Mr. Scott expected to receive notice of the appellant's resignation, so he was not surprised when the appellant failed to return to work. (Scott testimony)
 21. By Friday, February 9, 2008, after the appellant had failed to appear for work, request leave, or contact the agency to explain his absence, Mr. Geary began to process pre-termination and termination paperwork. (Scott and Geary testimony)
 22. Director Cheney met with Mr. Hobby on February 16, 2007, to discuss the reasons supporting Mr. Hobby's dismissal from employment. At the meeting Mr. Hobby admitted that he had received a phone message from Mr. Scott, but said he could not recall the nature of the message. At the hearing, Mr. Hobby described the message as "garbled," and said that he did not need to contact the agency because he was waiting to hear from Mr. Scott. (Hobby testimony)
 23. Director Cheney recalled asking Mr. Hobby at the pre-disciplinary meeting, "Fourteen days and you didn't call anybody?" Mr. Hobby had no answer, and Director Cheney decided that termination was the appropriate level of discipline. (Cheney testimony)
 24. In his letter dated February 12, 2007 addressed to Director Cheney, Mr. Hobby made no reference to being too ill to report for work, but claimed instead that his job

description was not approved, that the commute to Concord represented a cut in pay because of travel costs, that he "had seniority," and had never requested a transfer. He argued that he only agreed to "give it a try" working in Concord as the result of a grievance, and that once he had told Mr. Scott he wanted to return to Laconia, he was simply awaiting instructions from Mr. Scott or Mr. Geary. (State's Exhibit 10)

Rulings of Law:

- A. Per 602.01 (a) of the NH Code of Administrative Rules authorizes an appointing authority to transfer agency employees from any position within the same class title to a vacant position with the same class title, as the Department did in assigning Mr. Hobby. The evidence reflects that the position was made available through the efforts of then Director of Personnel Levchuk, at least suggesting that approval had been given for that assignment. There was no evidence offered to the contrary.
- B. Per 602.01 (b) of the Code of Administrative Rules provides that the appointing authority may determine when it is in the best interest of the agency to transfer an employee.
- C. Per 1002.08 (b)(15) of the NH Code of Administrative Rules provides for the immediate dismissal of an employee without prior warning when an employee is absent for a period of 3 or more consecutive workdays without proper notification or acceptable reason.
- D. In accordance with Per 1002.03 of the NH Code of Administrative Rules, appointing authorities may consider a variety of factors in determining the appropriate level of discipline. Those factors include, but are not limited to "(a) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the functions of the agency; and (b) The employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense."
- E. Mr. Hobby was given an opportunity at the meeting of February 27, 2007 to refute the evidence supporting his dismissal, as required by Per 1002.08 (d) which states, in pertinent part, "No appointing authority shall dismiss a classified employee under this

section until the appointing authority: (1) Offers to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee; (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority..."

- F. The notice of termination dated February 28, 2007 (3) documents in writing the nature and extent of the offense, as required by Per 1002.08(d)(3).
- G. Per-A 207.12(b) of the NH Code of Administrative Rules provides that in order to prevail on appeal, an appellant must demonstrate by a preponderance of the evidence that the termination was unlawful, that it violated the rules of the division of personnel, that it was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, or that it was unjust.

Discussion:

Although Mr. Tardif argued that Mr. Hobby believed he was entitled to return to his old position in Laconia following his reinstatement, the evidence clearly reflects that the appellant was advised that his position would report to the office in Concord following his initial two weeks at the Laconia PSAP. On direct examination, Mr. Tardif asked Mr. Hobby what he believed the Board meant in its January 10, 2007 oral order. Mr. Hobby replied, "That I was ordered to go back to work in Laconia at the job that I previously came from." However, when Mr. Tardif asked if anyone from the agency ever pointed out that the appellant's job would actually be located in Concord, the appellant admitted that they had, that he knew he was being assigned to work in Concord, and that the work location was indicated on the job description. The evidence also reflects that Mr. Hobby discussed with Mr. Scott whether or not he intended to challenge that assignment, advising Mr. Scott that after discussing the matter with his union representatives, Mr. Hobby had decided to "give it a try." Apart from Mr. Hobby's comment to Mr. Scott that Mr. Hobby would be happy to stay in Laconia, there is no evidence of an actual complaint to the appointing authority from the appellant that he had been improperly transferred, or a request from the appellant for his position to be reassigned to Laconia. Similarly, there is no evidence of a grievance based on any action of the appointing

authority other than an informal request from union representatives regarding payment of a travel voucher for the day Mr. Hobby traveled from his temporary assignment in Laconia to Concord in order to obtain his ID.

In his original notice of appeal, Mr. Hobby claimed that he called Mr. Scott on February 5, 2007 and reported that he was "too ill to report to work for the indefinite future." However, in his notice of appeal, Mr. Hobby certified that he told Mr. Scott that he "...wanted to return to where [he] was supposed to be, Laconia, and [he] asked what [he] needed to do and when they were going to return [him] to Laconia." Mr. Hobby then claimed that the phone "became disconnected and [he] never received a return call from Mr. Scott, or BEM, except a voicemail that Mr. Scott left [him] on February 6, 2007, which message was unintelligible." (March 13, 2007 Notice of Appeal, page 3). During the hearing, when Ms. Modigliani asked the appellant why he did not return Mr. Scott's call, Mr. Hobby testified, "I was waiting to hear from you folks." When asked if Mr. Scott ever gave the appellant permission to remain out of work, Mr. Hobby replied, "I didn't have any contact... I was under the impression that I was under suspension right there and then."

The Board found that the appellant knew he was expected to report for work at the Concord office, but failed to do so. The appellant's challenge to his assignment, filed in the form of a Motion for Contempt, was dismissed as a matter outside the Board's jurisdiction and authority by letter addressed to the parties on January 26, 2007. In that letter, the Board indicated that the remedy sought could be obtained from the Superior Court, if appropriate. After the date of that notice, the appellant reported for work in Concord as directed, until he called in sick on February 2, 2007, and called Mr. Scott on February 5, 2007, to say he could not make the long commute.

The appellant's testimony that he believed he was "under suspension" after his February 5, 2007 call to Mr. Scott clearly contradicts his March 13, 2007 notice of appeal, where he indicated that Mr. Scott knew that Mr. Hobby was out sick and would remain out indefinitely due to illness. Both those statements contradict the appellant's explanation

of the reason for his continuing absence in his February 12, 2007 letter to Director Cheney (State's Exhibit 10), where he challenges the nature of the transfer, claiming that he was awaiting further instructions. All those explanations contradict the assertion made in paragraph 15 of the "Conclusion" section of the appellant's memorandum in which he claims that he called Mr. Scott on February 5, 2007 to report that he was still sick, that Mr. Scott became agitated and argumentative, that the appellant informed Mr. Scott that he wanted to be returned to Laconia, and that neither Mr. Scott nor the appellant knew how that could be accomplished. In light of all those inconsistencies, the Board found that the appellant's testimony simply was not credible.

Decision and Order:

Having carefully considered the evidence offered by the parties, the Board voted unanimously to DENY Mr. Hobby's appeal, finding that the agency was authorized to dismiss the appellant for being absent for three or more consecutive working days without appropriate notice or adequate reason.

THE PERSONNEL APPEALS BOARD

/s/

Patrick Wood, Chairman

/s/

Robert Johnson, Commissioner

/s/

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Marta Modigliani
Thomas Tardif

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