

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Stephanie Johnson - Docket #2010-T-009

Department of Safety

January 5, 2011

The New Hampshire Personnel Appeals Board (Wood, Bonafide, Johnson and Casey) met in public session on Wednesday, December 15, 2010, to hear the appeal of Stephanie Johnson, a former employee of the State Fire Marshal's Office in the Department of Safety. Ms. Johnson, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing her November 18, 2009, termination from employment as a Fire Investigator for allegedly showing such a significant lack of judgment and responsibility as a law enforcement officer during an extra detail assignment on September 20, 2009, that it warranted her immediate dismissal without prior warnings for the same offense. Attorney Sheri Kelloway appeared on behalf of the Department of Safety.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, Joint Stipulations filed by the parties, the audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

1. November 17, 2009, Letter of Intent to Dismiss
2. November 18, 2009, Notice of Dismissal
3. Internal Investigation Report filed by District Chief Max Schultz, Case #99212009
4. November 18, 2009, Letter from Commissioner Barthelmes to Director Degnan

Appellant's Exhibits

1. City of Concord Departmental Events Detail Report 9/20/2009

The following persons gave sworn testimony:

Maxim Schultz, District Chief

Stephen Foster, SEA Steward

J. William Degnan, State Fire Marshal

Stephanie Johnson, Appellant

The witnesses were sequestered at the Appellant's request.

Position of the Parties

Attorney Reynolds argued that the Appellant was entitled to reinstatement as a matter of law, arguing that while the State pointed to a lot of evidence in its case and in the letter of dismissal, the State violated the provisions of Per 1002.08 and prevented the Appellant from refuting the evidence because it failed to provide the Appellant with copies of the evidence upon which it relied in deciding to dismiss her from her position as a Fire Investigator. He also argued that if the Board were to consider the appeal on its merits, the Appellant should be reinstated. Attorney Reynolds argued that this was a one-time event, and that the Appellant knew of a number of people who had forgotten their weapons before. He argued that there was no actual danger when the Appellant asked her daughter to retrieve the weapon and deliver it to the Appellant. He further argued that the State was wrong when it said that the Appellant felt no remorse about the incident, noting that she had learned something from the incident and should not have been dismissed without prior warning.

Attorney Kelloway argued that the agency did inform the Appellant of the evidence upon which it relied, detailing that evidence in both the Intent to Dismiss letter and Letter of Dismissal. Attorney Kelloway argued that although the Appellant had the opportunity to refute that evidence, she failed to do so. Attorney Kelloway argued that the material facts of the case were not in dispute. When the Appellant discovered that she had forgotten to bring her state-issued firearm with her to the NASCAR race detail on September 20, 2009, the Appellant chose to have her 19-year old daughter retrieve, transport and deliver the weapon to her at the detail location. Attorney Kelloway argued that although delivery of the weapon was made without incident, the situation she created was nothing short of a disaster waiting to happen, as the Appellant chose to put a 19-year old in charge of a loaded weapon, knowing that the weapon would be ready to fire as soon as the magazine was inserted. Attorney Kelloway noted that in addition to the 19-year old, two or three of the Appellant's other, minor, children were also in the vehicle. Attorney Kelloway argued that the Appellant's conduct was so egregious and her lack of judgment so extreme that the Agency had no choice but to dismiss her.

Findings of Fact

The material facts in this case are not in dispute. According to the Joint Stipulations offered by the parties:

1. Ms. Johnson was hired by the New Hampshire Department of Safety/Division of Fire Safety ("DFS") as a part-time temporary Fire Inspector on December 9, 2002.
2. On May 13, 2005, Ms. Johnson was promoted to part-time Fire Investigator at DFS, Labor Grade 21, Step 1.
3. On April 21, 2006, Ms. Johnson became a full-time Fire Investigator at DFS, Labor Grade 21, Step 2.

4. On September 20, 2009, Ms. Johnson had volunteered to work a detail at the New Hampshire Motor Speedway in Loudon, NH. In working that detail, Ms. Johnson was working in her capacity as a Fire Investigator employed by DFS.
5. Ms. Johnson, on September 20, 2009, notified her supervisor, Deputy Fire Marshal Robert Farley, that she would be arriving late for the detail and that she had forgotten an important piece of equipment. Ms. Johnson did not bring her firearm to the detail. She called her daughter and arranged for her daughter to bring that firearm to her at the detail. Ms. Johnson's daughter did bring the firearm to Ms. Johnson at the detail; two minor children were also in the vehicle that Ms. Johnson's daughter drove to bring the firearm to Ms. Johnson.
6. DFS began an investigation subsequent to the above-mentioned incident.
7. On November 18, 2009, Ms. Johnson was terminated from employment.
8. Pursuant to the Board's September 22, 2010, oral order, and pursuant to the parties' agreement: the issue for the Board to decide relates only to the incident of September 20, 2009, and the subsequent related actions. Prior letters of warning and counselings [sic] shall not be litigated in this case; and are not to be considered in the Board's deliberations and decision as to whether it will or will not uphold this termination.

After hearing the witnesses' testimony and reviewing the documentary evidence presented by the parties, the Board made additional findings as follows:

9. During one of the two telephone conversations between the Appellant and Deputy Marshal Farley on September 20, 2009, Deputy Marshal Farley asked the Appellant what piece of equipment she had forgotten to bring with her to the detail. The Appellant did not tell him that it was her service revolver; instead, she said, she told him "lightheartedly" that he would have less to write up if he did not know.
10. When the Appellant told Deputy Marshal Farley that she was having someone else bring the forgotten piece of equipment to the Appellant at the work detail, Deputy Marshal Farley did not know that the missing piece of equipment was the Appellant's state-issued service revolver, or that it was the Appellant's 19-year old daughter who was being asked to deliver the weapon to the detail in Loudon.
11. The Appellant's service weapon was a .45 caliber Smith and Wesson semi-automatic pistol. The weapon does not have a "safety" in the traditional sense, although the weapon is designed not to fire unless the magazine is inserted into the weapon. The only safety feature is a magazine release safety. According to the training personnel receive through NH Police Standards and Training, the weapon is considered "loaded" if there is a bullet in the chamber, because once the magazine is inserted, the weapon is ready to fire.
12. When the Appellant's daughter delivered the Appellant's service weapon to the Appellant, there was a bullet in the chamber of the weapon, but the magazine was separate from the weapon. Had the magazine been inserted into the weapon, it immediately would have been ready to fire up to eleven rounds.
13. The weapon was delivered to the Appellant on the side of Route 106 by the Appellant's 19-year old daughter. According to the Appellant, the 19-year old, who was driving the Appellant's personal vehicle, carried the

weapon in her lap while driving to meet the Appellant, and the 12-year old, who was riding in the front passenger seat, kept the magazine on the seat near the door. When they arrived, the 19-year old handed the Appellant the weapon through the front passenger window, and the 12-year old handed the Appellant the magazine. The Appellant's 5-year old daughter was riding in the back seat of the vehicle. The Appellant was uncertain if another of her children may have been in the vehicle as well. The Appellant testified that she would have preferred it if the 19-year old had come alone, but she had no concerns about any real danger letting her daughter retrieve, handle or transport the weapon, because her daughter was familiar with firearms safety and knew that she needed to keep the ammunition separate from the weapon.

14. If the Appellant had been required to engage in an enforcement activity, or to back up another officer where the use of deadly force might have been involved, she was unprepared and could not have assisted fully.
15. Following its investigation of the incident, the State Fire Marshal's Office notified the Appellant by letter dated November 17, 2009, that it was the Department's intention to dismiss the Appellant from state service as a sworn Fire Investigator as a result of her conduct on September 20, 2009. The letter, signed by State Fire Marshal William Degnan, advised the Appellant that the meeting would take place on November 18, 2009, and informed her that the purpose of the meeting would be, "...to discuss the evidence supporting our intent to dismiss you and to give you an opportunity to refute it. The evidence consists of the investigative report filed by District Chief Maxim Schultz. You may bring a union representative with you..."
16. The Appellant was accompanied to the November 18, 2009, meeting by her union steward, Stephen Foster, and a union employee, Jeffrey Brown. Although the Appellant had a copy of District Chief Schultz's investigative report when she was dismissed, the Appellant testified that she did not recall if either of her union representatives had asked for a copy of District Chief Schultz's investigative report during the pre-disciplinary meeting on November 18, 2009.
17. The evidence upon which the agency relied in deciding to dismiss the Appellant was detailed in the November 17, 2009, intent to dismiss letter. That same information was reviewed with her at the meeting on November 18, 2009. When the Appellant was asked during cross-examination if she had attempted to refute the evidence discussed at the meeting on November 18, 2009, she said that she had not, or did not recall.

Rulings of Law

1. Per 1002.08 (d) (1) and (2) require an appointing authority to "[offer] to meet with the employee to discuss whatever evidence which the appointing authority believes supports the decision to dismiss the employee; [and offers] to provide the employee with an opportunity to refute the evidence presented by the appointing authority..." The Department of Safety complied with the provisions of Per 1002.08 (d)(1) and (2) of the NH Code of Administrative Rules when it offered to meet with the employee on November 18, 2009 to discuss whatever evidence the appointing authority believed supported the decision to dismiss the employee. The

evidence upon which the agency relied was described in the November 17, 2009, Intent to Dismiss letter as the investigative report completed by District Chief Schultz, along with a clear statement of what the agency believed had occurred on the morning of September 20, 2009.

2. The Department of Safety complied with the provisions of Per 1002.08 (d)(3) of the NH Code of Administrative Rules by detailing in its November 18, 2009, dismissal letter the nature and extent of the offense for which the Appellant was dismissed.
3. In compliance with the provisions of Per 1002.03 (a) and (b) of the NH Code of Administrative Rules, the Department of Safety determined the appropriate form of discipline by considering, "(a) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and 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." The Department acted within its authority when it determined that this single incident was so egregious and represented such a significant lack of judgment for a trained law enforcement employee that it warranted dismissal without prior warning under the provisions of Per 1002.08(b) of the NH Code of Administrative Rules.

Decision and Order

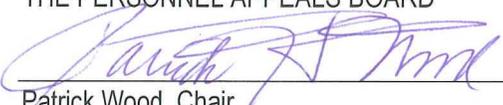
In response to questions from the Board at the conclusion of the hearing on the merits of her appeal, the Appellant acknowledged that one of the ten firearms safety rules that she learned at the police academy says that weapons should be kept out of the hands of children. She admitted that she did not expect to see her 12-year old daughter or her 5-year old daughter in the vehicle when her 19-year old daughter delivered the weapon to her on the morning of September 20, 2009, at the NH Motor Speedway. She also admitted that there may have been one more child in the vehicle. The Appellant admitted that it was reasonable for Fire Marshal Degnan and District Chief Schultz to have concerns about allowing children, including a minor child, to be in possession of the various parts of a weapon that could be put together and immediately fired. Nevertheless, she stated, "Yes, but I trusted my oldest to keep it away from the children My children are very careful and responsible and cognizant of weapons, and if a child had intent to do harm, then that would have been dangerous; but knowing their state of mind, that was not dangerous. In general, their stability -- they're not suicidal or have penchants for high risk behaviors." In the Board's opinion, the Appellant's assessment of her children's stability or level of responsibility is completely immaterial. In order to save herself from the embarrassment or possible discipline that might have resulted if her supervisors learned that she had forgotten to bring her service weapon with her to the detail at NH Motor Speedway, the Appellant deliberately put a deadly weapon and ammunition into the hands of children without any adult supervision

According to the Appellant, when her supervisor questioned her on the morning of the Speedway detail about what equipment she had forgotten to bring with her, she replied "lightheartedly" that he would have less to write if he did not know. Although the Appellant did not lie directly, she deliberately avoided telling her supervisor the truth. When the Appellant realized that she would not be able to make it home to pick up the weapon and get back to the Speedway on time, the Appellant called home, woke her children, and instructed her 19-year old daughter to retrieve a weapon and a fully-loaded ammunition clip from a locked storage area, put them in the family car, and drive them to a busy sporting event on unfamiliar roadways where the Appellant herself said the traffic was heavier than she had expected when she had left home that morning.

Attorney Reynolds argued that the Appellant should not have been dismissed as a result of a single incident, asserting that the Appellant knew of a number of officers who had forgotten to bring their service weapons to a work assignment. The Board found that argument to be without merit. The Appellant was not dismissed for neglecting to bring her weapon to an assignment or being unprepared for duty; she was dismissed for exercising extraordinarily poor judgment and placing at least three of her own children in a potentially deadly situation by in order to avoid the consequences of her own substandard performance. The Board found that the Department of Safety acted within its authority in deciding to dismiss the Appellant for those reasons.

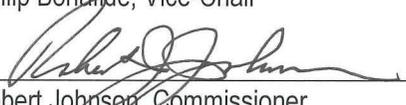
Therefore, for all the reasons set forth above, the Board voted unanimously to DENY the Appeal of Stephanie Johnson and to UPHOLD the Department of Safety's decision to dismiss her without prior warning.

THE PERSONNEL APPEALS BOARD



Patrick Wood, Chair

Philip Bonafide, Vice-Chair



Robert Johnson, Commissioner

Joseph Casey, Commissioner

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