

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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

### APPEAL OF THOMAS LANDRY

Department of Revenue Administration

Docket #95-T-11

June 7, 1995

On October 19, 1994, the New Hampshire Personnel Appeals Board received a letter dated October 15, 1994, signed by Attorney James Moir, requesting a hearing on behalf of Thomas Landry, a former employee of the Department of Revenue Administration. Mr. Moir asserted that Mr. Landry had been notified by letter dated October 4, 1994, that he had been terminated from employment effective immediately.

In pertinent part, Mr. Moir's October 15th letter of appeal stated:

"The purpose of this letter is to notify the Personnel Appeals Board of his desire to appeal the termination decision pursuant to RSA 21-I:58."

"Mr. Landry understands that our legislature has conferred upon permanent state employees a specific right of appeal to the personnel board in termination actions. Mr. Landry requests that a hearing be scheduled as per the personnel rules and that a copy of the relevant regulations governing such procedures be forwarded to him through his counsel."

On October 28, 1994, the Board received from the Department of Revenue Administration, through its representative V. Hummel Berghaus, IV, Esq., a Motion to Dismiss the instant appeal. In that Motion, the Department argued that the appellant's hearing request was deficient in that it failed to specify the action in dispute, and failed to offer a detailed description of why the action was inappropriate. Attached to that motion were the following exhibits:

- Exhibit A: October 4, 1994 notice of termination with attachments including copy of application for the position of Real Estate Appraiser, dated 09-01-88
- Exhibit B: Copy of Return from Superior Court concerning December 18, 1980 charge of arson against the appellant

Exhibit C: Supplemental Job Description for Real Estate Appraiser Trainee

On November 2, 1994, the appellant filed an Objection to Motion to Dismiss Appeal, arguing that on the date of termination, Mr. Landry was informed he had only fifteen days in which to "give notice of his intent to appeal" while having to "cope with the shock of his termination, retain counsel and notify the Department and this Honorable Board of his intent to Appeal." Attorney Moir argued that the Department's Motion to Dismiss was "contrary to the spirit and plain meaning of the Rules of the Personnel Board" because the appellant had made "good faith attempts to appeal the termination decision of the Department in a complete and timely manner." The Board does not agree.

Mr. Landry's letter of termination (State's Exhibit A) does not advise him that he has fifteen days to "give notice of his intent to appeal." It clearly advises him that an appeal may be filed within fifteen calendar days, as well as providing constructive notice concerning the form in which that appeal must be made.<sup>1</sup> Attorney Moir's October 15, 1994 letter sets forth no basis for appeal, stating only that Mr. Landry wished to notify the Board of his "desire to appeal the termination".

In his Objection, Attorney Moir stated, "Mr. Landry admits that he failed to strictly comply with N.H. Code. Admin. R. 202.01 due to retaining counsel within the fifteen day period..." Neither the Personnel Rules nor the Rules of the Personnel Appeals Board require an employee to be represented by counsel, nor do they provide for the late-filing of an appeal because an employee elects to be represented by counsel.

In his Objection, Attorney Moir argued that dismissing the appeal would be contrary to the "spirit and plain meaning" of the Board's rules. He asserted that the appellant had made good faith efforts to appeal his termination in a complete and timely manner. However, the Board noted that after requesting a copy of the "relevant regulations governing such procedures", the appellant made no attempt to comply with the relevant regulations until after he had received the State's Motion to Dismiss. In his Objection to the State's Motion to Dismiss, Attorney Moir stated:

"Upon information and belief, the true reason for Mr. Landry's termination has nothing to do with this six year old application for employment [which failed to reveal his 1980

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<sup>1</sup>RSA 21-I:58 cited in the letter of termination provides for appeals to be heard in accordance with the procedures provided for adjudicative proceedings in RSA 541-A. PART Per 202 of the Personnel Rules cited in the letter of termination provides for informal settlement of disputes, which begins with a "detailed written description of the basis for the dispute."

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arson conviction], but is illegal, arbitrary and capricious."

However, Mr. Moir failed to state with any specificity what he believed to be the real reason(s) for termination, or why the stated reason(s) should be considered illegal, arbitrary or capricious.

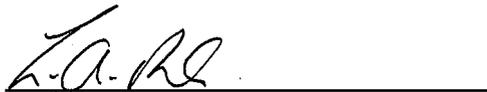
Per-A 201.03 provides for a suspension of the rules in certain instances, when, "In the interest of expediting a hearing or for other good cause, the Board may, unless otherwise precluded by law, suspend the requirements or provisions of any rules in this Chapter on application of a party or on the Board's motion." However, the appellant failed to provide good cause why he could not comply with the provisions of Per-202.01 by filing the appeal in writing within fifteen days of the action giving rise to the appeal, and by stating the action complained of, with a detailed description of why the appellant believes the action was inappropriate.,

The Board found that the appellant failed to show good cause why his appeal was not properly filed within the time fixed by rule and law. Accordingly, the Board voted to grant the State's Motion to Dismiss.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director  
V. Hummel Berghaus, IV, Revenue Counsel  
John Moir, Esq.

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### *APPEAL OF THOMAS LANDRY*

*Docket #95-T-11*

*Department of Revenue Administration*

*June 12, 1997*

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met Wednesday, April 9, 1997, under the authority of RSA 21-I:58, to hear the appeal of Thomas Landry, a former employee of the Department of Revenue Administration. Mr. Landry, who was represented at the hearing by Attorney David I. Bailinson, was appealing his October 4, 1994, termination from employment from his position as a Real Estate Appraiser. Attorney V. Hummel Berghaus, IV and Attorney Beth Fowler appeared on behalf of the Department of Revenue Administration. The record in this matter consists of the audio tape recording of the hearing on the merits of Mr. Landry's appeal, pleadings submitted by the parties prior to the hearing, orders and notices issued by the Board, and exhibits admitted into the record at the hearing.

The following persons gave sworn testimony at the hearing:

Guy Petell, Director of the Division of Property Appraisal  
Jeannie Samms, DRA Business Administrator  
Barbara Reid, Assistant Commissioner, Department of Revenue Administration  
Stanley Arnold, Commissioner, Department of Revenue Administration  
Attorney James Moir  
Dr. Richard Marchand  
Thomas Landry, Appellant

The following exhibits<sup>1</sup> were admitted into evidence:

- State's #2: 9 calendar pages summarizing Mr. Landry's use of leave - November, 1993 through June, 1994
- State's #3: November 19, 1993, letter from Dr. David R. Coursin to Guy Petell releasing Mr. Landry to work
- State's #4: July 1, 1994, letter from Barbara Reid to Thomas Landry notifying him of immediate suspension without pay following Mr. Landry's arrest on a Class B Felony charge of arson
- State's #5: 9/1/88 application of Thomas Landry for the position of Real Estate Appraiser Trainee I
- State's #6: October 4, 1994, notice of immediate termination, with attachments<sup>2</sup>, to Thomas Landry signed by Commissioner Arnold
- State's #7: May 24, 1995, letter from Richard Marchand, Ph.D., to Attorney James Moir re: Thomas Landry
- State's #8: June 21, 1995, letter from Richard Marchand, Ph.D., to Attorney Jean Claude Sakellarios re: Thomas P. Landry
- State's #9: December 19, 1980, Return From Superior Court, Merrimack County, Docket #80-S-151 I

Mr. Landry was dismissed, effective October 4, 1994, for allegedly falsifying his 1988 application for promotion by failing to disclose a 1980 arson conviction, and by certifying that he had never been convicted of an offense which had not been annulled by a court. Within fifteen days of his dismissal, Attorney James Moir filed on Mr. Landry's behalf a notice of his "intent" to exercise his rights to appeal that termination. The Department of Revenue Administration then moved for dismissal of the appeal, arguing that the appeal was completely deficient in that it failed to specify the basis for the dispute, or the reasons why the appellant believed the agency's action was inappropriate. Attorney Moir filed an objection, arguing that the appellant had made a good faith effort to exercise his appeal rights, and that technical deficiencies in his pleadings did not constitute good cause for dismissal of his appeal.

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<sup>1</sup> There was no State's Exhibit #1 admitted into evidence.

<sup>2</sup> Attachments include: December 19, 1980, Return From Merrimack County Superior Court, November, 1980, Complaint, December 19, 1980, Acknowledgment of Rights signed by Thomas Landry, cover sheet of 1988 application of Thomas Landry for position of Real Estate Appraiser Trainee I.

On June 5, 1995, the Board issued an order granting the Department's Motion to Dismiss, finding that the appellant had failed to show good cause why his appeal was not properly filed within the time fixed by rule and law. Attorney David Bailinson then filed a Motion for Rehearing on the appellant's behalf. Mr. Bailinson argued that if the Board believed the appeal was deficient, it had an obligation under Per-A 202.02 of the Board's rules to issue an order requiring the appellant to provide more specific facts.

Attorney Berghaus filed his department's objection in which he argued that the burden was upon the appellant to state the basis for his appeal, that the provisions of Per-A 202.02 were discretionary, and that the rules did not require the Board to issue an order for more specific facts, except upon the Board's own motion or if it agreed with the motion of a party. He argued that instead, the Department filed a Motion to Dismiss, and that such motion was well supported by evidence and affidavit. He argued that the Board's original decision dismissing the appeal was both lawful and reasonable.

Before taking up the merits of Mr. Landry's appeal, the parties were allowed to offer further argument on the Appellant's pending Motion for Rehearing and Appeal of Decision to Dismiss filed by Attorney Bailinson on June 27, 1995, and the Department's Objection to same, filed by Attorney Berghaus on July 3, 1995. Having heard the parties on the Motion and Objection, the Board concluded that prejudice to the appellant might be too great if the Board were to make a final decision without taking any additional evidence. Accordingly, the Board voted to take the Motion under advisement and have the parties present their evidence. In so doing, however, the Board noted that evidence to be offered on the merits of Mr. Landry's appeal also could bear to some degree on substantiation for the Appellant's Motion for Rehearing. The Board believed that in either case, the evidence should be sufficient to decide either the pending motion or the merits of Mr. Landry's appeal.

Having heard the evidence and argument offered by the parties, the Board voted unanimously to deny the Motion for Rehearing. The Board affirmed its earlier decision, finding that Mr. Landry, who was at all times represented by counsel, failed to show good cause why his appeal could not be properly filed within the time fixed by rule and law.

Had the Board decided Mr. Landry's appeal on the merits, the Board would have denied his appeal for the reasons set forth below:

### Findings of Fact

1. On September 1, 1988, Mr. Landry applied for promotion to a position of Real Estate Appraiser Trainee I at the Department of Revenue Administration. At that time he was employed by the department as a Clerk IV. (State's 5)
2. On his application for promotion to Real Estate Appraiser Trainee I, Mr. Landry described his Clerk IV duties as follows: "Responsible for all duties in regards to personnel. I give orientation to all new employees, all the paperwork involved in a new hire or promotion, review applications, job postings and paperwork on terminated employees. Try to solve any personnel problems that might arise..."
3. On that employment application, Mr. Landry answered "no" to the following question: "Have you ever been convicted for violations of any laws that have not been annulled other than minor traffic violations?"
4. That application bore the following statement: "A conviction does not automatically eliminate you from state employment since the nature of the crime and type of job for which application is made will be considered."
5. On the application, Mr. Landry signed the following affirmation: "I certify that there are no willful misrepresentations in and falsifications of the above statements and answers to questions. I understand that should investigation disclose such misrepresentations and falsifications, my application may be rejected, and should I be employed, my services may be terminated."
6. Mr. Landry was selected for promotion to the position of Real Estate Appraiser

7. Real Estate Appraisers conduct inspections of homes and businesses for the purpose of assessing their value, and in so doing may make interior and exterior inspections of residential and/or commercial properties with little or no supervision.
8. During their inspections, Appraisers are likely to arouse less suspicion than a stranger might normally arouse when entering a property.
9. In June, 1994, Mr. Landry was working on a field assignment performing property assessments in the Town of Conway, New Hampshire.
10. On June 30, 1994, Mi- Landry was arrested on Class B Felony Arson charges by the Conway Police Department.<sup>3</sup>
11. Prior to the arrest, Conway Police Chief Robert Mullen notified the Revenue Commissioner Stanley Arnold of the impending arrest, and inquired if the Department had prior knowledge of Mr. Landry's 1980 arson conviction.
12. Neither Commissioner Arnold nor Assistant Commissioner Reid were aware of Mr. Landry's conviction.
13. On July 1, 1994, following notice of Mr. Landry's arrest, Barbara Reid, Assistant Commissioner of the Department of Revenue Administration, met with Mr. Landry and gave him written notice of his immediate suspension without pay as a result of his having been arrested for an offense which was in conflict with the duties of his position.
14. In her letter, Ms. Reid stated, "A charge of arson is a 'criminal wrongdoing which is in conflict with the duties' of a real estate appraiser." Ms. Reid's letter advised Mi- Landry that if he disputed the contents of the letter, he had fifteen days in which to initiate informal settlement as outlined in Per 202.01, and that if he failed to take such action, it would be assumed that he acknowledged that the letter of suspension was justified. Mi- Landry did not request informal settlement, nor did he file an appeal with this Board.

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<sup>3</sup> The appellant was later convicted for felony arson.

15. At Commissioner Arnold's request, Ms. Reid undertook an investigation to determine if Mr. Landry had a record of criminal conviction, and, if so, whether or not the Department's records contained reference to that conviction.
16. Ms. Reid obtained a copy of records from the Merrimack County Superior Court, including Mr. Landry's December 18, 1980, guilty plea to charges of arson. The documents that Ms. Reid obtained indicated that Mr. Landry was sentenced to the House of Corrections for 12 months, with the sentence suspended for good behavior. Mr. Landry was placed on probation for 2 years, during which period he was to make restitution for the damages caused. The additional fine of \$500 plus 10% penalty was suspended.
17. Ms. Reid reviewed the department's personnel files and found that on his 9/1/88 application for promotion, Mr. Landry had indicated that he had never been convicted of an offense which had not been annulled by a court.
18. On October 4, 1994, Commissioner Arnold and Attorney Berghaus met with Mr. Landry and his attorney, James Moir, to discuss Mr. Landry's termination from employment on charges that Mr. Landry willfully falsified his 1988 application for promotion. (State's 6)
19. At that meeting, Attorney Arnold gave the appellant notice of termination. That notice listed the evidence supporting his dismissal, an explanation of the nature and extent of the offense, a description of why the offense was incompatible with Mr. Landry's assignments as a Real Estate Appraiser, and notification of the appellant's rights to appeal the termination to the Personnel Appeals Board.
20. Appended to the letter of termination were documents including the appellant's job description, a copy of the appellant's application for the position of Real Estate Appraiser, and a copy of the Return from Superior Court from Merrimack County Superior Court related to the appellant's 1980 guilty plea to the charge of arson.
21. At the meeting with Commissioner Arnold and Attorney Berghaus, neither Mr. Landry nor his attorney offered information to refute the evidence, nor did they dispute the charge contained in the letter of termination.

Rulings of Law:

- A. "Optional Dismissal. In cases such as, but not necessarily limited to, the following, the seriousness of the offense may vary. Therefore, in some instances immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted. ... (6) Willful falsification of agency records, including, but not limited to: e. Applications for employment." Per 1001.08(b)(6)e.
- B. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) meets with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee prior to issuing notice of dismissal. (2) provides the employee an opportunity at the meeting to refute the evidence presented by the appointing authority... (3) documents in writing the nature and extent of the offense; (4) lists the evidence the appointing authority used in making the decision to dismiss the employee." Per 1001.08(f)(1)-(4)
- C. "If an appointing authority, having complied with the provisions of Per 1001.08(f), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall: (1) Prepare a written notice of dismissal, specifying the nature and extent of the offense; (2) Notify the employee in writing that the dismissal may be appealed under the provisions of RSA 21-I:58, within 15 calendar days of the notice of dismissal... (3) forward a copy of the notice of dismissal to the director." Per 1001.08 (g)

Much of the evidence that the Board received in connection with this appeal pertained to events occurring long after the appellant's 1980 arson conviction and his 1988 application for selection to the position of Real Estate Appraiser. Insofar as the termination arose out of the department's discovery of a falsification on Mr. Landry's application, and the appellant has withdrawn his claim that his dismissal was a result of his disability, the only

pertinent facts were those related to Mr. Landry's 1988 application for employment<sup>4</sup>. Accordingly, the only pertinent issues are the following:

1. Whether Mr. Landry made a willful falsification on his 1988 application for the position of Real Estate Appraiser by indicating that he had not been convicted of any offense that had not been annulled by a court.
2. Whether conviction of arson is sufficiently incompatible with the duties of a Real Estate Appraiser to preclude an individual with record of such a conviction from holding the position of Real Estate Appraiser.
3. Whether Commissioner Arnold abused his discretion by dismissing Mr. Landry from his employment as a Real Estate Appraiser for falsification of his application for promotion to Real Estate Appraiser.
4. Whether the Department of Revenue Administration violated the Rules of the Division of Personnel by preparing its notice of dismissal before meeting with Mr. Landry to discuss the evidence supporting his dismissal.

Mr. Landry testified that when he made application for the position of Real Estate Appraiser, he believed his conviction had been annulled. However, he admitted that he never petitioned for annulment of the conviction and took no steps to discover whether or not the annulment had occurred before he signed the application wherein he claimed no record of conviction.

At the time of his application, Mr. Landry considered himself sufficiently knowledgeable in personnel matters to describe himself as "responsible for all duties in regards to personnel" including new employee orientation, handling all paperwork involved in new hires and promotions, reviewing applications, and handling all job postings. He had an affirmative

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<sup>4</sup> While it has no bearing on the ultimate disposition of Mr. Landry's appeal, the Board regrets that no prehearing conference was convened in this matter to narrow the scope of the hearing, eliminating the need for much of the testimony and evidence.

obligation to ensure that the conviction had been annulled before certifying that he had record of conviction.

Conviction of arson clearly conflicts with the duties of a Real Estate Appraiser. As Commissioner Arnold noted in the letter of termination, a Real Estate Appraiser, "... has the opportunity to examine properties without supervision and without the normal wariness of neighbors." Commissioner Arnold's position, that he would not have hired Mr. Landry as an appraiser had he been aware of the 1980 arson conviction, is both lawful and reasonable, since the job would require Mr. Landry to work in, "an environment of unsupervised access to private property."

Per 1001.08 (b)(6)e of the Rules of the Division of Personnel, the Optional Dismissal provision, allows an appointing authority discretion to weigh the seriousness of an offense in deciding whether to issue one warning prior to discharge or to dismiss the employee immediately. In this instance, Commissioner Arnold did not abuse his discretion by dismissing Mr. Landry without prior warning, given the nature of the offense in relationship to Mr. Landry's duties as a Real Estate Appraiser

With respect to the Department's alleged violation of Per 1001.08 (f), the Board found that there was no violation, and therefore no need for relief. Commissioner Arnold asked Mr. Landry to meet with him to discuss the appellant's continued employment. Commissioner Arnold granted Mr. Landry's request to have an attorney present. Commissioner Arnold provided Mr. Landry and his attorney with copies of the relevant documents upon which the Department relied in determining that Mr. Landry had falsified his 1988 application for employment. The Commissioner also documented in writing both the nature and extent of the offense as it related to Mr. Landry's duties as an appraiser. If the appellant believed the allegation to be untrue, he had an affirmative duty to refute the evidence that the appointing authority had presented.

Per 1001.08 (f) requires the appointing authority to "list the evidence the appointing authority used in making the decision to dismiss the employee" (emphasis added). Clearly, the rule describes events, including but not limited to the meeting with the employee, that occur after the appointing authority has made a tentative decision to dismiss the employee. The rule also does not require an appointing authority to elicit any information from the employee, or undertake any further investigation of the offense before being authorized to dismiss the employee. The rule merely requires the appointing authority to provide an opportunity for the employee to refute the evidence. Assuming, for the sake of argument, that the appellant had sufficient information to refute the evidence or allegation contained in the letter of termination, his failure to take advantage of that opportunity<sup>5</sup> does not constitute a violation on the employer's part.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

  
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Mark J. Bennett, Acting Chairman

  
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Robert J. Johnson, Commissioner

  
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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
V. Hummel Berghaus, IV, Esq.  
David I. Bailinson, Esq.

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<sup>5</sup> Attorney Moir and the appellant, Mr. Landry, gave sworn testimony that they were not constrained in any way with respect to information they were allowed to offer at the meeting. In fact, Attorney Moir testified that in his opinion, had he asked for an opportunity to consult privately with his client before the meeting with Commissioner Arnold and Attorney Berghaus was concluded, that request would have been granted.