

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
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Appeal of Brenda Langis

Docket #2010-T-008

Department of Health and Human Services, Disability Determination Unit

May 5, 2010

The New Hampshire Personnel Appeals Board (Wood, Bonafide and Casey) met on Wednesday, February 10, 2010, and Wednesday, March 17, 2010, under the authority of RSA 21-I:58 and Chapters Per-A 100-200, to hear the appeal of Brenda Langis, a former Case Aide from the Disability Determination Unit at the Department of Health and Human Services. Ms. Langis, who was represented at the hearing by SEA General Counsel Michael Reynolds, was appealing her October 27, 2009, termination from employment for allegedly violating Per 1002.08 by committing offenses listed in Per 1002.04 (b) (1), (4) and (9). Ms. Langis argued that the letter of termination was inaccurate, that there were insufficient grounds for her termination, and that the termination was unjust under all the circumstances. Attorney Jennifer Jones, appearing on behalf of the Department of Health and Human Services, argued that although the letter of intent to dismiss and the dismissal notice itself cited offenses listed under the written warning section of the Personnel Rules, the conduct itself was so egregious that it warranted the appellant's immediate dismissal without prior warning.

The record of the hearing in this matter consists of pleadings submitted by the parties, an audiotape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

- A. Email from Gail Deary to Brenda Langis, sent August 31, 2009, at 3:42 p.m.

Appellant's Exhibits

1. Performance Summaries (4) from 2005 to 2009
2. Email messages (9 pages) between May 18, 2009 through October 19, 2009
3. Step II Grievance dated May 27, 2009

4. Letter to SEA Grievance Representative Nicholas McGinty from Gail Deary dated June 8, 2009
5. Notice of Intent to Terminate addressed to Brenda Langis, dated October 20, 2009
6. Letter to Marie Lang, Ombudsman's Office, from SEA General Counsel Michael Reynolds dated December 23, 2009
7. Termination Letter addressed to Brenda Langis, dated October 27, 2009

The following persons gave sworn testimony:

Gail Deary, Disability Determination Unit Supervisor IV

Brenda Langis, Appellant

Position of the Parties

In her October 20, 2009, Notice of Intent to Dismiss letter, Gail Deary, the Appellant's supervisor, wrote that Ms. Langis' behavior toward her supervisor and her co-workers had been difficult "for some time," but that the appellant's actions in the months leading up to termination had "so quickly and dramatically escalated these difficulties as to make [the appellant's] further employment relationships impossible." In that letter, Ms. Deary referred specifically to exchanges between herself and the appellant on August 31, 2009, and October 8, 2009, that Ms. Deary described as "persistent refusal to follow the legitimate directives of a supervisor, which include gross insubordination and the disrespectful, disdainful and contempt-filled manner in which [the appellant had] interacted with [Ms Deary, as her supervisor] and [the appellant's] co-workers." [SEA Exhibit 5]

The letter of dismissal issued to the appellant on October 27, 2009, cites alleged violations of the following rules as the basis for the appellant's dismissal:

Per 1002.04 (b) (1) – Failure to meet any work standard

Per 1002.04(b)(4) – Repeated unscheduled absences, unless authorized, and

Per 1002.04(b)(9) - .Disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting, abusive or obscene language or gestures [SEA Exhibit 7]

Attorney Jones argued that the behavior exhibited by the appellant in her August 31, 2009, meeting with Ms. Deary to discuss the appellant's ongoing attendance issue was severe enough to warrant disciplinary action, and that Ms. Deary was in the process of preparing a written warning when the October 8, 2009, incident occurred. Attorney Jones argued that it became clear at that time that management could no longer tolerate the appellant's misconduct when it escalated to the point of slamming drawers, yelling and directing profanity at her supervisor. Attorney Jones argued that while there were no Personnel Rules directly on point regarding the appellant's repeated use of profanity

and her ongoing insubordination, the Rules did provide for termination without warning for offenses such as the persistent refusal to follow the legitimate orders of a supervisor. That refusal, she argued, coupled with the appellant disrupting the office, refusing to take responsibility for her own behavior, and calling her supervisor an "a**hole," was sufficient to justify immediate termination without prior warning.

Attorney Reynolds argued that the appellant was a good employee with pristine work records, and that there was nothing in her personnel record about problems with attendance, language, or conduct. He argued that there had been no form of progressive discipline, despite the agency's claim that there had been "meetings and discussions" about the appellant's behavior. He also argued that while the use of profanity might warrant some form of discipline, there was no violation sufficiently egregious to warrant termination, particularly in light of the evidence of unfair treatment by co-workers in what the Ombudsman's Office had described as a "toxic" workplace. Attorney Reynolds argued that the appellant was entitled to reinstatement with back pay, both as a matter of fundamental fairness and as a result of the agency effecting a termination without prior warning for offenses that warranted, at most, a written warning under the provisions of the Personnel Rules. He also asserted that the appellant was entitled to reinstatement without loss of pay based on an alleged violation of the Rules, arguing that Ms. Deary failed to disclose the existence or the substance of "management notes" Ms. Deary relied on in deciding to dismiss the appellant. He argued that Ms. Deary also failed to apprise the appellant of the identity of the co-workers who supposedly heard the appellant call her supervisor an "a**hole," and reportedly told Ms. Deary that the appellant had returned to her office on the afternoon of August 31, 2009, slamming her cabinet drawer and saying that she would be calling in sick the following day because she was "pissed."

Summary of the Evidence As Presented by the Parties

Since her promotion in 2007, Brenda Langis worked as one of four Case Aides in the Disability Determination Unit (DDU) in the Division of Community Based Care Services in the Department of Health and Human Services under the supervision of Gail Deary, Supervisor IV. Ms. Langis believed that she and her supervisor, Gail Deary had a good working relationship prior to the time that Ms. Deary hired Jackie Newton, who was reported to be a friend of Ms. Deary's. According to Ms. Langis, Ms. Newton said that she and Ms. Deary had grown up together and "went to the same clubs." Ms. Deary admitted that she and Ms. Newton socialized with one another. Ms. Langis described them as "best friends."

Some time during May, 2009, Ms. Langis approached Ms. Newton to inform Ms. Newton of mistakes that Ms. Langis believed Ms. Newton was making in the office's case files. That same day, Bureau Administrator Penny Caldwell was meeting with Ms. Deary in a nearby office. According to Ms. Langis, shortly afterwards, Ms. Newton "twirled"

into Ms. Langis' work area, claiming that Administrator Caldwell had asked Ms. Newton "who the whiner was," and had said that if Ms. Langis didn't like the situation, she know whom she could call. Ms. Langis asked who Ms. Newton was talking about and Ms. Newton responded, "the Ombudsman." Ms. Langis was one of several employees who had been interviewed by the Department of Health and Human Services' Ombudsman's Office in or around May, 2009, about an alleged "toxic workplace." Although Ms. Langis says that she did not request an investigation by the Ombudsman's Office, she did communicate with staff from the Ombudsman's Office throughout the summer and fall regarding deteriorating relations between herself, her co-workers and her supervisor. [SEA Exhibit 2]

By letter dated May 27, 2009, addressed to Assistant Commissioner Rollins, SEA Grievance Representative Nicholas McGinty filed a Grievance on behalf of Brenda Langis, asserting that Ms. Langis had been subjected to "threatening comments made by management," as described above, after Ms. Langis "expressed her concerns about the appropriateness of comments made by a supervisor in response to Ms. Langis pointing out errors in case forms." [SEA Exhibit 3] Ms. Deary responded by letter dated June 8, 2009, discussing a June 2, 2009, meeting between herself, Ms. Langis, Mr. McGinty, and Bureau Administrator Penny Caldwell at which they discussed Ms. Langis' grievance. According to Ms. Deary, Ms. Langis had come to her office in May complaining about errors being made on forms by Ms. Newton and other support staff. Ms. Langis said that she had been offended by Ms. Newton's demeanor and tone of voice when Ms. Langis had attempted to discuss the issue. Ms. Langis also complained about Ms. Newton's comments about Administrator Caldwell, and the suggestion Ms. Caldwell reportedly made that Ms. Langis could contact the Ombudsman's Office if she "didn't like the situation." In her June 8th letter, Ms. Deary denied the grievance, stating, "I do not feel that this circumstance violated any of the referenced provisions of the Collective Bargaining Agreement..." She closed by suggesting that Ms. Langis alert her at any time that she felt communications or work exchanges were inappropriate or unprofessional. [SEA Exhibit 4]

On June 12, 2009, Ms. Langis received a Performance Summary Form completed and signed by Gail Deary. The evaluation indicated that Ms. Langis was meeting expectations in each of sixteen performance categories including "Job Knowledge," "Quantity of Work," "Quality of Work/Accuracy," "Consistency," "Verbal Communications," "Written Communications/Record Keeping," "Courtesy," "Customer Service," "Dependability," "Commitment Toward the Job," "Cooperation/Teamwork," "Initiative," "Safety," "Attendance," "Punctuality," and "Appearance." Ms. Deary added comments in various sections of the evaluation, including: "Brenda is open to new ideas and continues to broaden her knowledge as it relates to medical terminology." "Brenda and I have made two adjustments to her caseload this past year in an effort to arrive at a manageable workload for her." "Brenda and her nurse [reviewer] have begun monthly meetings so that they can connect regularly to discuss processes." "Brenda has chosen to give up things such as the Coffee Fund and other non-specific work related tasks so that she can direct her full focus on meeting

into Ms. Langis' work area, claiming that Administrator Caldwell had asked Ms. Newton "who the whiner was," and had said that if Ms. Langis didn't like the situation, she knew whom she could call. Ms. Langis asked who Ms. Newton was talking about and Ms. Newton responded, "the Ombudsman." Ms. Langis was one of several employees who had been interviewed by the Department of Health and Human Services' Ombudsman's Office in or around May, 2009, about an alleged "toxic workplace." Although Ms. Langis says that she did not request an investigation by the Ombudsman's Office, she did communicate with staff from the Ombudsman's Office throughout the summer and fall regarding deteriorating relations between herself, her co-workers and her supervisor. [SEA Exhibit 2]

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her work deadlines." There are no specific comments suggesting problems with the appellant's attendance, punctuality, communications, or interactions with fellow staff members, and no indication that the appellant needed to take any form of corrective action to improve her work performance or conduct. [SEA Exhibit 1, pages 1-5]

Ms. Langis testified that her situation in the DDU became difficult immediately after she filed the grievance against Jackie Newton, complaining about the favoritism Ms. Deary showed toward Ms. Newton, and questioning the lack of action by either Ms. Deary or Ms. Caldwell to intervene. On July 28, 2009, Ms. Langis sent email to her SEA representative, with copies to the Ombudsman's representative and to Nancy Rollins, Division Director, describing another interaction between herself and Jackie Newton on July 21, 2009, involving the removal of a can of room deodorizer that Ms. Langis had left in one of the restrooms. Ms. Langis complained about Ms. Deary's reaction when Ms. Langis asked Ms. Deary to resolve the dispute, writing, "I find this behavior unacceptable of a supervisor and her best friend who were laughing about it. How will this incident be rectified now...maybe a big conference with HR, Nancy Rollins, Office of the Ombman, etc. like the last one..." [SEA Exhibit 2, page 2] It appears there was no response from either Ms. Deary, Ms. Rollins or Ms. Lang.

On August 31, 2009, Ms. Deary sent the appellant an email message [SEA Exhibit 2, page 3] asking the appellant to come to Ms. Deary's office. Ms. Deary testified that she intended to discuss the appellant's tardiness during the prior two-week period, but her message to the appellant simply stated, "Can you come by at 1:30?" Ms. Langis sent an email reply asking, "Is there any particular reason?" Ms. Deary responded, "So we can talk." The appellant concluded the email exchange by writing, "We don't need to converse at this time. Thanks." Ms. Langis testified that she thought Ms. Deary wanted to discuss an issue between Ms. Langis and her assigned "nurse reviewer," and felt that further conversation was unnecessary as the issue had been resolved. After receiving Ms. Langis' response, Ms. Deary went to speak directly with the appellant, asking her to come back to Ms. Deary's office. During their meeting, Ms. Deary asked the appellant to explain why she had been late three times in the preceding two weeks. The appellant responded, "It can't be helped." Ms. Deary asked what Ms. Langis meant and the appellant repeated that it couldn't be helped. When Ms. Deary told the appellant they might have to talk about adjusting the appellant's work hours in order to address the issue of tardiness, Ms. Langis said she would simply fill in a leave slip if she was late, a suggestion Ms. Deary said would not serve as a long-term solution. The conversation lasted approximately 15 minutes. When Ms. Deary again discussed changing the appellant's work hours, Ms. Langis became visibly upset and angry, claiming that it sounded as if Ms. Deary was threatening her. Ms. Langis then stood up and "stormed out of the office." Approximately ten minutes later, Ms. Langis returned and tossed a leave slip onto her supervisor's desk, announcing that she was leaving. The leave slip requested approval for sick leave; the reason for leave was listed as "harassment by supervisor - migraine." Ms. Langis told Ms. Deary that she did not care whether or not Ms.

Deary approved the leave, and said that there would be no more discussion between the two of them without Ms. Langis' union representative present. [Testimony of Gail Deary and Brenda Langis, and State's Exhibit A]

On August 31st, after Ms. Langis had left the office, Ms. Deary sent the appellant an email recapping the exchange that had occurred between them that afternoon. Ms. Deary wrote, "Your job requires you to meet with your supervisor as necessary regarding performance issues; unless the issues are disciplinary representation will not be present. You have my word, that you will always be advised if an issue is disciplinary or could result in disciplinary action." She concluded the email by informing the appellant, "Upon your return [from sick leave], we will need a meeting with your representation to discuss the issue of supervision so you understand the difference between that and disciplinary [sic]." Although the email was sent to Ms. Langis' work email account, Ms. Langis was not at work that afternoon or the following day, and Ms. Langis did not specifically recall receiving the email. [State's Exhibit A] Ms. Langis' husband called the DDU on the morning of Tuesday, September 1, 2009, and said that Ms. Langis would not be coming to work that day because she was suffering from high blood pressure and a migraine headache. Ms. Langis called the DDU office on Wednesday and Thursday, September 2nd and 3rd saying that she would not be at work those days. Ms. Deary was on vacation on Friday, September 4th when the appellant returned to work.

Throughout the month of September, relations between Ms. Deary, Ms. Langis and co-workers in the DDU continued to deteriorate. On September 8, 2009, Ms. Deary spoke to Ms. Langis about how her leave requests were being submitted, telling Ms. Langis that whenever she took unplanned leave, as she had on the first three days of September, Ms. Langis would need to state a specific reason for leave and the type of leave being taken. According to Ms. Deary, the appellant "became defensive and argumentative," insisting that she had given a reason for needing leave. Ms. Langis then said it would not matter anyway, because she had a doctor's note coming. [SEA Exhibit 5, page 2] On September 23, 2009, Ms. Langis sent an email to Marie Lang at the Ombudsman's Office, complaining that she and others were concerned that Jackie Newton was being allowed to earn comp time in order to allow her to take Friday's off. "Many of us," she wrote, "would like this option of convenience but we are not Gail's [Ms. Deary's] 'best friend' in the DDU." Ms. Lang responded by email on September 29, 2009, suggesting that Ms. Langis might want to request a change in her own schedule. [SEA Exhibit 3, page 4] On September 28, 2009, one day before Ms. Lang's response was sent to the appellant, Valorie Harmon, one of Ms. Langis' coworkers, sent her an email about contacting a client. In the email, Ms. Harmon wrote, "I am including Lori [Rich] and Gail [Deary] because I am not confident Brenda will read or respond to this email in a timely manner." Ms. Langis replied by email two days later, "Val: I found this email to be very insulting and unnecessary. I don't know where this animosity is coming from and really don't appreciate it." [SEA Exhibit 2, page 5]

On October 1, 2009, Ms. Langis emailed her supervisor, with copies to the Ombudsman's Office and managers in the Commissioner's Office regarding, "Unprofessional behavior in the workplace." Ms. Langis wrote that she was following up with Rita [Ersch, Valorie Harmon's sister] on a records request. Ms. Langis indicated that Ms. Ersch said she was unable to find the form because Jackie Newton had taken it from her and had thrown it away, telling her that Ms. Langis was wasting her time. Ms. Langis asked Ms. Deary how she should proceed, noting that if she had not followed up on the request herself, the doctor who had requested the record would not have received what he needed in a timely manner. [SEA Exhibit 2, page 6] No written response was offered.

On October 6, 2009, Marie Lang emailed the appellant, asking if the appellant had been able to converse with Gail Deary and Penny Caldwell about the October 1st incident. Ms. Lang wrote, "I am hopeful that you were able to have a positive and constructive dialog." [SEA Exhibit 2, page 7] Ms. Langis replied to Ms. Lang on October 13, 2009, explaining that she had received no response from Ms. Caldwell, and that the only response she had received from Ms. Deary was a verbal response during which Ms. Deary had told her "there was no big conspiracy here..." Ms. Deary reportedly explained what had happened with the records, but failed to address the question of why Ms. Newton had thrown out one of the records that the appellant had requested. Ms. Langis concluded her email by saying, "There have been other developments and now I'm being taunted by Rita Ersch and her sister Valorie Harmon. I went to speak to Gail about it and Gail blamed it on me so I left last Thursday very upset. I'm back today (13th) and thinking about contacting EAP now. Respecting others is one of our new Goals for the DDU. Funny thing is that just a few of us are regularly disrespected and scolded like children by other adults. The beat goes on..." [SEA Exhibit 2, page 7]

Among the new developments mentioned by Ms. Langis in her October 13th email was an incident that occurred on October 8, 2009, involving Ms. Langis, Ms. Ersch, Ms. Harmon and Ms. Deary. Ms. Langis testified that she had not been in the office more than half an hour when she saw Ms. Ersch come "limping around the corner." She did not see Ms. Ersch using crutches, as was later reported. Ms. Langis told her, "We're going to need some paper for the printer." Ms. Ersch did not say anything at the time, but Ms. Langis overheard her using the phone saying, "I tried that." At that point, Ms. Ersch's sister, Valorie Harmon, brought paper to the printer and reportedly "slammed" it on the table, telling Ms. Langis, "You should have been at the last meeting with the Ombudsman because we were told how to be respectful." Ms. Langis asked if Ms. Harmon had a problem with her, to which Ms. Harmon replied, "You should have been at the last meeting." Ms. Langis recalled Ms. Harmon saying, "You should know about people who can't walk." Ms. Langis testified that she felt she had been treated poorly in the exchange and went to Ms. Deary to report what had happened. According to Ms. Langis, Ms. Deary refused to help, saying that much of the problem was a result of Ms. Langis' own behavior. [Testimony of Brenda Langis]

Ms. Deary recalled the incident differently, saying that she heard loud voices as Ms. Langis "engaged two co-workers in an aggressive and offensive manner, and [was] so loud that [she] disrupted the entire office." Ms. Langis then came into Ms. Deary's office and slammed the door, demanding to know what Ms. Deary was going to do about the situation. According to Ms. Deary, when she tried to help Ms. Langis accept responsibility for her own role in the situation, Ms. Langis exited the office, telling Ms. Deary that she was "petty and childish" and calling Ms. Deary an "a**hole." Ms. Deary said that she followed the appellant to her office and found Ms. Langis preparing a leave slip. Ms. Deary testified that Ms. Langis accused her of "hovering" over Ms. Langis as the appellant filled out the leave request. Ms. Langis told Ms. Deary that she could sign the slip or not. Ms. Langis then stood to leave and again called Ms. Deary an "a**hole." [SEA Exhibit 5] Ms. Langis admitted that she was upset and angry, but said she did not recall exactly what she said to Ms. Deary. There is no documentation of any further discussion between Ms. Deary and Ms. Langis about the incident. until it was brought up in the Notice of Intent to Terminate and during the pre-termination meeting. [Testimony of Gail Deary and Brenda Langis]

On October 19, 2009, James Samson of Northeast Evaluation Specialists, sent an email message to Valorie Harmon about whether or not "the State" had received a report that he believed had been sent the week before. Ms. Harmon replied by email, with copies to Brenda Langis, Lori Rich and Gail Deary, saying, "The case aide who works the Rochester D.O. is behind in logging in provider records/reports. Your report is here in the DDU, but has not been logged in as having been received." Ms. Langis responded by sending an email to all the recipients of the Harmon email stating, "I found this email to be a bit misleading and in need of clarification. The FCE was received by the DDU on 10/16/09 after I finished all other input of reports and since I was not in the office yesterday, I am one day behind on the input of FCEs. Sorry for any misunderstanding or misleading statements by other parties." Less than fifteen minutes later, Ms. Harmon sent Ms. Langis an email stating, "Your comments are not even worth a response." [SEA Exhibit 2, page 8]

On October 20, 2009, Ms. Deary delivered to Ms. Langis a "Notice of Intent to Terminate." The four and a half page letter described in substantial detail Ms. Deary's recollection of her interactions with the appellant since August 31, 2009, when she first attempted to address the issue of Ms. Langis being tardy. Ms. Deary wrote that the appellant's behavior was intolerable, and that "gross insubordination, absolute contempt and disrespect" that Ms. Langis had shown to Ms. Deary as her supervisor, including Ms. Langis calling her an "a**hole" were "intolerable in the workplace" and warranted her dismissal. [SEA Exhibit 5]

According to Ms. Deary, when she later met with the appellant and her SEA Representative Michelle McCord to review the Notice of intent to Dismiss, Ms. McCord focused on the issue of attendance, asserting that the appellant should have been offered FMLA leave because the appellant's husband was ill, and that the appellant had informed

her employer that she suffered from migraines. In the letter of dismissal issued to Ms. Langis on October 27, 2009, Ms. Deary indicated that although she had no specific information about Mr. Langis' health, she had offered to adjust the appellant's work schedule to assist her in being more punctual. She also indicated that in discussing the issue of attendance, Ms. McCord failed to address "the core problem and reason for the intent to dismiss notice: your unacceptable behavior in responding to discussions regarding underlying issues." Ms. Deary also wrote, "Michelle's assertion that you have not had progressive discipline is also inaccurate. Although the discussions were not in written form, the number of meetings and discussions about your behavior certainly constitute a progression. This is also demonstrated by the fact that your unacceptable, unprofessional and disrespectful behavior continued to escalate after each meeting. You made no attempt to modify or adjust your inappropriate responses and you refused to receive and respond professionally and with respect to constructive direction from your supervisor." Ms. Deary's dismissal notice concludes, "After reviewing all the evidence and considering the intent to dismiss presentation by your Representative, Michelle McCord, there is no new information that would demonstrate that you are able to perform your essential duty assignments, which include treating your co-workers and supervisor with respect in the workplace. All the issues presented and discussed have the same key element: your inability to professionally communicate and cooperatively work with co-workers and your supervisor. When you are confronted you become short-tempered, rude, disrespectful, intolerant and domineering in your communications and approach. We have decided to immediately Dismiss you from State service effective October 27, 2009." [SEA Exhibit 7]

Having carefully considered the evidence and arguments offered by the parties, the Board made the following findings of fact and rulings of law:

Findings of Fact:

1. On October 27, 2009, the date of her dismissal, Ms. Langis was employed full-time as a Case Aide in the Disability Determination Unit at the Department of Health and Human Services in the Division of Community Based Care Services. Ms. Langis was dismissed for allegedly committing three separate types of offenses including failure to meet any work standard [Per 1002.04 (b)(1)], repeated unscheduled absences, unless authorized [Per 1002.04 (b)(4)], and disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting, abusive or obscene language or gestures [Per 1002.04 (b)(9)], as well as for engaging in what her supervisor described as "gross insubordination, absolute contempt and disrespect."
2. Between 2005 and 2009, each of Ms. Langis' annual performance evaluations showed her meeting expectations overall, and meeting expectations in each of the individual performance categories. The final Performance Summary presented to Ms. Langis in June, 2009, showed her meeting expectations in all

areas, including "Attendance," "Punctuality," "Verbal Communications," "Courtesy," and "Cooperation/Teamwork."

3. There is no record of Ms. Langis ever receiving a written warning or any other formal discipline in connection with her attendance, work performance, or interactions with supervisors or co-workers until the date of her dismissal.
4. There is no record of Ms. Langis ever being required to complete a corrective action plan or performance improvement plan.
5. All but one of Ms. Langis' requests for approval of unscheduled leave, including requests for sick leave, were granted.
6. There was no evidence offered to indicate that Ms. Deary questioned or counseled Ms. Langis' co-workers regarding their role in any unpleasant interactions with the appellant, despite the fact that their comments to and about the appellant appear to be as churlish and provocative as the appellant's own statements.
7. Ms. Langis' behavior toward her supervisor on August 31, 2009, after being confronted with the issue of her tardiness and possible changes to her work schedule, was rude and disrespectful, and while it could have resulted in the issuance of a written warning, no such warning was issued.
8. Ms. Deary followed-up the August 31st exchange with Ms. Langis with a lengthy email message, telling Ms. Langis that her continued tardiness and "resistance to meet" with Ms. Deary were unacceptable. There was no indication in the email that the appellant's behavior was disruptive, or that the appellant had used insulting, abusive or obscene language. Ms. Deary specifically noted that conversations such as the one concerning Ms. Langis' attendance were not disciplinary. Ms. Deary wrote, "Your job requires you to meet with your supervisor as necessary regarding work performance issues; unless the issues are disciplinary representation will not be present. You have my word, that you will always be advised if an issue is disciplinary or could result in disciplinary action." [State's Exhibit A]
9. Ms. Langis' behavior toward her supervisor after the October 8, 2009, incident in the hallway was rude, disrespectful, and involved the repeated use of insulting, abusive and profane language, and warranted disciplinary action.
10. There was no evidence offered of any follow-up to the October 8, 2009, incident until the date that Ms. Langis received the Notice of Intent to Dismiss.

Rulings of Law:

- A. At all relevant times, Ms. Langis was a full-time, permanent employee subject to the disciplinary provisions set forth in PART Per 1000 of the NH Code of Administrative Rules.

- B. Meetings and conversations, regardless of their content or their structure, do not qualify as recognized forms of discipline under the provisions of the Personnel Rules, and therefore can not be considered a method of progressive discipline.
- C. When appointing authorities consider the appropriate level of disciplinary action to take, Per 1002.03 imposes a responsibility upon the appointing authority to consider, "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," as well as, "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."
- D. Failure to meet any work standard; repeated unscheduled absences, unless authorized; and disruptive, disorderly or disrespectful conduct in the workplace, including the use of insulting, abusive or obscene language or gestures, are all offenses for which an employee may be disciplined, either by issuance of a written warning as set forth in Per 1002.04, or through the imposition of a disciplinary suspension.
- E. In those instances where an employee's conduct is sufficiently egregious that it warrants more substantial discipline than a written warning, Per 1002.06(a)(1) allows an appointing authority to suspend an employee without pay for up to 20 working days, "...when, under the particular circumstances, the appointing authority considers the conduct or offense to warrant the imposition of discipline more severe than a written warning."
- F. Per 1002.08 describes dismissal as "the most severe form of discipline." Employees may be dismissed upon issuance of a third written warning for the same offense within five years, or by issuance of a fifth written warning for different offenses within five years. In some cases, employees may be dismissed without prior warning, but the offense supporting dismissal must be significant, such as theft of valuable goods and services; endangering the life, health or safety of another employee or client of the agency; sexually harassing or discriminatory behavior; or the unlawful possession, manufacture or distribution of a controlled substance in the workplace.
- G. In accordance with the provisions of RSA 21-I:58, I, "...In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Decision and Order

In her closing statement, Attorney Jones argued that there was nothing in the personnel rules that addresses the appropriate response to "profanity laced tirades" directed at one's supervisor. The Board does not agree. The Rules specifically provide for the issuance of a written warning for behavior such as that in which Ms. Langis engaged on August 31, and October 8, 2009. The Rules also provide that an appointing authority may take a more severe form of discipline by suspending an employee without pay for as many as 20 work days, "...when, under the particular circumstances, the appointing authority considers the conduct or offense to warrant the imposition of discipline more

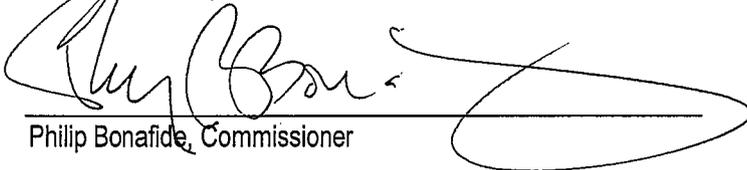
severe than a written warning." While the Board does not condone an employee hurling epithets at a supervisor, the Board also is unwilling to uphold the termination of a full-time employee for such conduct when the employee has never been disciplined or counseled, and the Rules specifically provide for a more measured and appropriate response to that level of offense.

On all the evidence, the Board voted unanimously to modify the decision of the appointing authority and reduce the appellant's dismissal to a suspension without pay for a period of 20 working days. As such, the appeal is GRANTED IN PART. The appellant shall be reinstated forthwith. Any compensation due to the appellant shall be reduced by interim earnings as set forth in the provisions of RSA 21-I:58, I; specifically, the award "...shall be equal to the salary loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from any other source during the period. 'Any other source' shall not include compensation earned from continued casual employment during the period if the employee held the position of casual employment prior to the period, except to the extent that the number of hours worked in such casual employment increases during the period." The appellant's award shall be further reduced to reflect a suspension without pay of 20 working days.

Ms. Langis' appeal is therefore GRANTED IN PART and the order of the appointing authority modified as set forth above.

THE NH PERSONNEL APPEALS BOARD


Patrick Wood, Chair


Philip Bonafide, Commissioner

 5-5-10
Joseph Casey, Commissioner

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