

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Lionel Lanouette

Docket #2009-T-019

Department of Transportation

March 30, 2011

The New Hampshire Personnel Appeals Board (Wood, Bonafide, and Johnson) met in public session on Wednesday, February 23, 2011, and Wednesday, March 2, 2011, to hear the appeal of Lionel Lanouette, a former Assistant Highway Patrol Foreman with the NH Department of Transportation, regarding his April 17, 2009, termination of employment for allegedly violating the State of New Hampshire Policy on Sexual Harassment. Attorney Olivier Sakellarios appeared on behalf of the Appellant. Attorney John Vinson appeared on behalf of the Department of Transportation.

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

State's Exhibits:

1. Twenty-one pages¹, Bates-stamped 000011 through 000031, regarding training the Appellant received on NH Department of Transportation and State of New Hampshire policies and procedures
2. State of New Hampshire Policy on Sexual Harassment
3. Seventy-one pages, Bates-stamped 000001 through 000071, including the April 17, 2009, Letter of Dismissal issued to the Appellant with 14 identified attachments and Appellant's written rebuttal submitted to the agency after his pre-disciplinary meeting
4. Twenty-two pages, Bates stamped 000001 through 000021, including the Appellant's performance evaluations for 2005 through 2008

¹ Appellant objected to inclusion of pages 1-10 of Exhibit 1, as they were not disclosed to the Appellant 5 working days before the date of the hearing on the merits of the appeal. Those pages were excluded.

The following persons, who were sequestered at the request of the parties, gave sworn testimony:

Lionel Lanouette, Appellant

Michael Bernier

Dale Leslie Purdy

Douglas DePorter

Kenneth Twombly, Sr.

Jeffrey Moore

Joseph Bailey

Position of the parties:

Attorney Vinson argued that the Appellant violated the State's Sexual Harassment Policy by making statements of a sexual nature to a subordinate, Dale Purdy, while both were assigned to NH Department of Transportation Shed 615 in Kingston, New Hampshire. Mr. Vinson stated that when the Department learned of the allegedly harassing conduct, an investigation was conducted by personnel assigned by the Director of Personnel. The investigators concluded that the Appellant had violated the State's policy, and that the violations were both severe and pervasive. Attorney Vinson argued that the Appellant's conduct warranted dismissal under the provisions of Per 1002.08 for violation of a posted or published policy, the text of which warns of dismissal for such violations.

Attorney Sakellarios argued that the Appellant denied making some of the comments attributed to him, and believed that other remarks were misapprehended by Ms. Purdy. Mr. Sakellarios argued that although the State might offer witnesses to corroborate some of the statements, there were substantial differences in what they claim to have heard. Mr. Sakellarios asserted that the Appellant never said anything to degrade or demean Ms. Purdy, and never attempted to embarrass her or make her the butt of any jokes. In one instance, Mr. Sakellarios argued, although the Appellant did ask if Ms. Purdy had difficulty or discomfort using any of the equipment because of her breasts or her menstrual cycle, he asked those questions to see if he should accommodate her by not assigning her that work.

Attorney Sakellarios argued that when Ms. Purdy first complained in 2008 to Dennis Perkins that she felt harassed, the Appellant's supervisors should have initiated some form of corrective action to avoid any incidents or misunderstanding in the months that followed. Instead, he argued, the Appellant's supervisors used the Appellant as a scapegoat, dismissing him from his employment rather than taking responsibility for their own inaction and lack of supervision in the patrol headquarters. Attorney Sakellarios argued that throughout her employment with the Department of Transportation, Ms. Purdy, the employee who complained of the Appellant's conduct, had a "litigious mind set" and did not take steps that were available to her to curtail behavior she considered inappropriate.

Preliminary matters:

Before taking up the merits of the appeal, the Board heard oral argument on the Appellant's motion to compel the production of Ms. Purdy's notes. Attorney Sakellarios argued that at Ms. Purdy's deposition, she indicated that she had taken contemporaneous notes as part of a work journal, and said that she was unable to answer some of the questions posed without referring to her notes. He argued that when he initially filed his motion, the State did not object to producing the notes, and the notes should be made available to the Appellant as they allegedly referred to the Appellant's conduct. Attorney Vinson argued that the State had requested copies of the notes as they were part of an underlying Human Rights Complaint by Ms. Purdy. Attorney Vinson stated that he had not seen the notes himself, and he was without authority to release them. After considering the parties arguments, the Board denied the Appellant's request and noted the Appellant's objection.²

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

1. Prior to his dismissal on April 17, 2009, the Appellant, Lionel Lanouette, was employed by the Department of Transportation as an Assistant Patrol Foreman assigned to the 615 shed where he supervised four Highway Maintainers: Ken Twombly, Mike Bernier, Joe Bailey and Dale Purdy. In his role as a supervisor, the Appellant received regular training on the State's Policy on Sexual Harassment. Training records admitted into evidence as State's Exhibit 1 show that the employee acknowledged receiving training on Employee Harassment and Discrimination on July 24, 2008, June 7, 2005, July 23, 2004, June 25, 2003, December 30, 2002, and May 9, 2002. The Appellant also testified that he had no question what behavior qualified as sexual harassment, and which statements made in the workplace could be considered evidence of sexual harassment.
2. On or about January 21, 2009, Dale Purdy, a female Highway Maintainer II assigned to the 615 shed, reported to the Department of Transportation that she had been subjected at work to sexually oriented misconduct. Ms. Purdy's complaint was transmitted to the Division of Personnel. Personnel Director Karen Hutchins appointed Thomas Sexton of the Department of Transportation and Sandra Adams of the Department of Resources and Economic Development to conduct an investigation into those allegations. As part of their investigation, Mr. Sexton and Ms. Adams interviewed the Complainant, Ms. Purdy, three named Respondents, including the Appellant, and nine witnesses. The investigators summarized each of the interviews and presented them to the interviewees as statements needing their signatures. The Complainant, Respondent and witnesses each signed their statements. Mr. Sexton and Ms. Adams compiled the information gathered into a report presented to the

² During the course of the hearing and based on the testimony of Ms. Purdy and Appellant's co-workers, the Board saw no need to reconsider its denial of this request.

Director of Personnel. They concluded that Ms. Purdy's allegations were proven by a preponderance of the evidence, and that the conduct itself violated the State's Policy on Sexual Harassment.

3. By letter dated March 24, 2009, Douglas DePorter, the District Six Engineer, informed the Appellant that after reviewing the investigative report, the Department of Transportation concluded that the report's findings would support a decision to dismiss the Appellant from his position as Assistant Patrol Foreman. The letter also advised the Appellant that he was scheduled to attend a pre-disciplinary meeting on March 25, 2009, to review that evidence. The Appellant and his union steward met with Mr. DePorter and Maintenance Superintendent Jeffrey Moore on Wednesday, March 25, 2009. Mr. DePorter presented the evidence that the Department believed supported the Appellant's dismissal. He then recessed the meeting in order to allow the Appellant and his union steward an opportunity to meet separately, review the evidence presented by the agency, and prepare a response and rebuttal.
4. By email dated March 25, 2009, the Appellant's steward, Tony King, asked Mr. DePorter to schedule another meeting and allow the Appellant additional time to prepare and present his rebuttal. The Appellant met again with Mr. DePorter and Caleb Dobbins, State Maintenance Engineer, on March 31, 2009, at which time the Appellant was given an opportunity to refute the evidence presented. That evidence included a copy of the investigative report, including witness statements signed by each individual interviewed during the course of the investigation. The Appellant prepared an initial, handwritten response/rebuttal to the statements included in the investigative report, and later submitted a further rebuttal, partially typed and partially handwritten. In both sets of responses, the Appellant denied engaging in any inappropriate behavior, claiming that witness accounts were either inaccurate or fabricated. In some instances, the Appellant alleged that it was the other members of the crew, including Ms. Purdy, who engaged in sexually inappropriate conduct.
5. By letter dated April 17, 2009, signed by Mr. DePorter, the Appellant was advised that he was being dismissed from his position as Assistant Highway Patrol Foreman for "violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in immediate dismissal, specifically, The State of New Hampshire's Sexual Harassment Policy." The letter of termination issued to the Appellant detailed the Department's receipt of Ms. Purdy's complaint, the ensuing investigation, and the conclusion reached by investigators that the Appellant's reported conduct toward Ms. Purdy constituted a violation of the State's policy in that it created a hostile, offensive and intimidating work environment.
6. Allegation #1
 - a. In the April 17, 2009, letter of dismissal issued to the Appellant, the State alleged that during a guardrail repair on or about April 16 2008, the Appellant approached Ms. Purdy, who was sitting on the last of the guardrail posts to be repaired, and pointed an air gun (impact wrench) at her, saying, "Open wide and I'll put this in. You can tell me how it feels." At the hearing on the merits of this appeal, Joseph Bailey, a member of the crew who was working on the guardrail post next to Ms. Purdy, testified that he heard the

Appellant say to Ms. Purdy, "Dale, spread your legs wide, I could..." Mr. Bailey testified that he moved away from the area, not wanting to hear the rest of the remark. He testified that, "I just couldn't imagine if it was my wife working on a job like that, I wouldn't want to hear it." Michael Bernier, another member of the crew, testified that he was working at the site as well and heard the Appellant say to Ms. Purdy, "I would like you to open up your legs," then saw him make a motion indicating that he wanted her to get out of the way.

- b. During his interview with investigators on February 12, 2009, the Appellant denied making any comments of a sexual nature to Ms. during work on the guardrail. In an email dated March 26, 2009, included as part of the Appellant's written rebuttal to the evidence presented at his pre-disciplinary meeting, the Appellant suggested that the incident could not have occurred as alleged, as there was no cable in the area where the incident allegedly occurred. In a further written rebuttal, the Appellant stated that any cable rail in that area would not have required the use of an impact wrench, and if had, it was more likely that Ken Twombly or Mike Bernier would have been using the tool. In a further written rebuttal, the Appellant wrote, "If Dale was sitting on a post and I had an impact wrench, I would have asked her to move so I 'WOULDN'T BE ACCUSED' of anything. Why are Mike and Joe 'sitting' about 6' away and not working?" He also suggested that noise from the use of an impact wrench and the noise of passing traffic would have made it almost impossible to hear what anyone might have said.
- c. In testimony during the hearing on the merits of his appeal, the Appellant gave a fairly detailed description of the incident, including his explanation that Ms. Purdy was sitting on the last guardrail post that needed to be repaired on the side of the post where the bolt was and he needed her to move. He testified that when he asked Ms. Purdy to move her legs, she just chuckled and moved her legs.
- d. Allegation #1 was proven by a preponderance of the evidence.

7. Allegation #2

- a. In the April 17, 2009, letter of dismissal issued to the Appellant, the State alleged that on or about April 29, 2008, the Appellant and his crew were putting down crushed asphalt using a vibrating compactor. As the compactor was being loaded onto the truck, the Appellant told Ms. Purdy, "Why don't you sit on this; it's a big vibrator." In his statement to investigators, the Appellant indicated that he never made a comment to Ms. Purdy about a compactor or tractor bucket being a vibrator. In his written rebuttal regarding the "vibrator" comment, the Appellant wrote, "If Joe or Mike were using the compactor and we were done with it I would not have been near the tractor. It would have appeared that there were enough people to take care of putting it into the bucket." He also wrote, "Mike's statement: He might have been the one to tell her to sit on it." The Appellant gave a different accounting of the incident in question during his testimony before the Board on March 16, 2011, testifying that he was present with the entire crew, and that when they were done with the job, material was brought over to his dump truck.

The Appellant testified that Joe Bailey and Mike Bernier were bringing the compactor to the bucket of the tractor while the Appellant brought in the loose material. He testified that the compactor was on a hard surface, and that he told Joe and Mike that they knew better than to run the compactor on a hard surface, and what he actually said was that because the compactor "bumps all over the place" it would "just vibrate itself to pieces." He testified that the compactor could not be bounced into the bucket of the tractor as the other witnesses had testified, because it would not bump up enough to make it over the three or four inch lip on the bucket. He testified that they had to shut the compactor off and pick it up. He also testified that if the tractor bucket were sitting on the ground, it would not vibrate, even if the truck were running.

- b. Michael Bernier testified that he recalled the incident, remembered that the compactor was running, and heard the Appellant speak to Ms. Purdy. He testified that, "[The Appellant said] That would be a really big vibrator, or something to that effect, and she should sit on that," or "Sitting on the bucket, that it would be a big vibrator, or biggest vibrator you ever saw."
- c. Allegation #2 was proven by a preponderance of the evidence.

8. Allegation #3

- a. In the April 17, 2009, letter of dismissal issued to the Appellant, the State alleged that on or about May 16, 2008, the Appellant and Ms. Purdy were alone in the Appellant's State assigned truck, that he asked Ms. Purdy, "Do they get in your way?" When she asked what the Appellant meant, the Appellant made the gesture of putting both hands in front of his chest in a small rotating motion and repeated the question. The State further alleged that when Ms. Purdy asked again what the Appellant meant, he stated, "Do your boobs ever get in the way when you're working?" The Appellant then asked, "Does your monthly menstrual thing get in the way when you're working?"
- b. The Appellant admitted that he spoke to Ms. Purdy about both the size of her breasts and her menstrual period, but insisted that he only did so in order to understand what work he should or should not assign to her. In his statement to investigators, the Appellant indicated that he had asked Ms. Purdy to let him know if there were any tasks she felt she could not do because she was a woman. He said he might have mentioned something about the "wrong time of the month," but indicated he did not say or do anything inappropriate. He said he did not recall mentioning breasts, but later testified that he did refer to breasts using a hand motion when asking if "they" got in Ms. Purdy's way while she was working.
- c. Allegation #3 was proven by a preponderance of the evidence.

9. Allegation #4

- a. In the April 17, 2009, letter of dismissal, the State alleged that some time during the summer of 2008, toward the end of the day at the patrol headquarters, the Appellant was telling Mr. Bailey, Mr. Twombly and Mr. Bernier about an upcoming trip to Virginia. The State alleged that the Appellant changed the

word to "vagina" when Ms. Purdy entered the room, repeating the word "vagina" several times. Kenneth Twombly, Michael Bernier and Joseph Bailey all testified that they heard the Appellant use the word "vagina" in place of Virginia when Ms. Purdy entered the room. The Appellant denied ever using the word "vagina" in front of Ms. Purdy or anyone when discussing a trip that he was planning to take to Virginia. He also insisted that he never would have used that word in front of Ms. Purdy.

b. Allegation #4 was proven by a preponderance of the evidence.

10. Allegation #5

a. In the April 17, 2009, letter of dismissal, the State alleged that on or about November 19, 2008, the Appellant used the word "boobies" in describing a nearby female pedestrian. Joseph Bailey testified that he recalled the incident as Ms. Purdy had reported it. Mr. Twombly and Mr. Bailey testified that they had heard the Appellant use the term "boobies" before, but did not specifically recall hearing the Appellant say "boobies" in front of Ms. Purdy on the date in question. The Appellant denied that he ever used the term "boobies" in front of the Appellant.

b. Allegation #5 was proven by a preponderance of the evidence.

11. Allegation #6

a. In the April 17, 2009, letter of dismissal, the State alleged that on or about January 13, 2009, while the Appellant, Mr. Twombly and Mr. Perkins were in Mr. Perkins' office, they heard Joseph Bailey out in the bay of the building imitating a cat, and that when Ms. Purdy entered the room, the Appellant asked, "Is that your pussy making that noise?" Mr. Twombly and Mr. Bernier both testified that they heard the Appellant ask Ms. Purdy, "Is that your pussy making that noise?" when Mr. Bailey was making cat noises in the bay area of the building.

b. The Appellant also told investigators that he remembered one of his co-workers, Joe Bailey, making "cat noises" at the shed, but denied ever using the word "pussy" at any time. In his written rebuttal, the Appellant wrote, "There should be no offensive [sic] to anyone saying, 'Did you get that pussy cat.' It's been a big joke for Joe and Dale and Mike and Ken when Joe does that." Later in his written rebuttal, the Appellant wrote, "He's got the word of Ken about what may have been said about the cat noise. It seemed to go from catch that pussy cat to 'Is that your pussy.' A big difference. He took someone else's word to make them his own." In his subsequent typed rebuttal, the Appellant stated, "If I did say catch that 'pussy' I guess I should have said catch that cat because that would have been what I meant... I have no idea how anyone else may have interpreted that into something I didn't intend to mean."

c. At the hearing on the merits of his appeal, the Appellant testified that he recalled the incident involving the cat noises. He stated that it occurred toward the end of day, that things were winding down, and the crew probably was putting things away. He said that he was sitting in the office with Dennis Perkins and

Ken Twombly, and that Joe Bailey was walking around the shed making noises like a cat. He said that when he heard the sound, he asked, "if somebody didn't catch that damn pussycat." The Appellant testified that Ms. Purdy asked what he had said, and he simply replied, "Is that the damned pussycat?"

- d. Allegation #6 was proven by a preponderance of the evidence.
12. The written response and rebuttal that the Appellant provided to Mr. DePorter during the predisciplinary process, prior to the actual decision to dismiss the Appellant, constituted a denial of all allegations but one; the Appellant admitted asking Ms. Purdy if there was work she felt she could not do physically. The remainder of the written rebuttal, especially that portion which is typed and handwritten, consists of complaints about members of the crew being lazy, hard of hearing, manipulative, untruthful, or ineffective in performing their jobs. He also included allegations that Ms. Purdy and others engaged in conversations and conduct that was inappropriate and sexually oriented. The Department of Transportation did not find that the Appellant engaged in legally actionable sexual harassment, but that he engaged in conduct that violated the State of New Hampshire Policy on Sexual Harassment.
 13. The Appellant's conduct during those incidents described in the investigative report, and as summarized in the Appellant's April 17, 2009, letter of dismissal, included unwelcome, graphic verbal comments to Ms. Purdy, and unwelcome, graphic verbal comments about Ms. Purdy's body, and constituted a violation of the State of New Hampshire Policy on Sexual Harassment.
 14. Per 1002.08 (b)(7) allows an appointing authority to dismiss an employee without prior warning for "...violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in immediate dismissal."
 15. According to the State of New Hampshire Policy on Sexual Harassment, "In order to rise to the level of legally actionable sexual harassment, conduct creating a hostile work environment must be severe or pervasive. However, it is the intent of the State to prevent conduct from escalating to the point that a hostile work environment exists. To that end, the following conduct is considered inappropriate and is prohibited in the workplace regardless of whether it rises to the level of being severe or pervasive: verbal abuse of a sexual nature; unwelcome, offensive, sexual flirtation; unwelcome, graphic verbal comments about an individual's body; sexually degrading words to describe an individual...[and] ...Whether the conduct is severe or pervasive shall be considered in determining the level of appropriate corrective action required..."

Standard of Review

In accordance with the provisions of Per-A 207.12 (b) of the Code of Administrative Rules (Rules of the Personnel Appeals Board:

In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

- (1) The disciplinary action was unlawful;
- (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;
- (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
- (4) The disciplinary action was unjust in light of the facts in evidence.

Decision and Order:

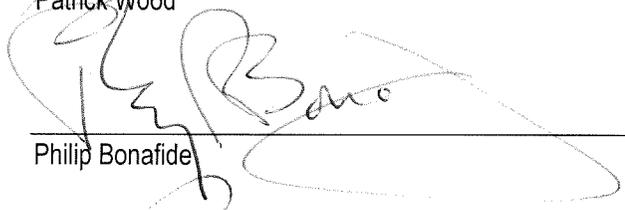
In light of its finding that the Appellant repeatedly engaged in behavior that violated the State of New Hampshire Policy on Sexual Harassment policy, the Board concluded that the Department of Transportation acted within its discretion in deciding to dismiss the Appellant without prior warning for his conduct toward, and in front of, Ms. Purdy. In reaching that conclusion, the Board took into consideration the Appellant's assertion that the agency was looking for a scapegoat once it learned that Ms. Purdy had filed a complaint with the NH Human Rights Commission. The Board also took into consideration evidence that Ms. Purdy may, from time to time, have engaged in sexually oriented banter as well, including evidence that she printed the words "trouser trout" on a white board hanging on another DOT employee's office door, and that she discussed "friends with benefits" with the Appellant. Although the Board found Ms. Purdy's explanation of that behavior to be rather disingenuous, the Board also found that it did not give the Appellant license to make repeated, graphic, sexually demeaning remarks to or about Ms. Purdy. Further, the Board found that the Appellant had received sufficient training on the State's policy, and fully understood which behaviors might violate that policy. Nevertheless, he engaged in conduct that was unwelcome, sexually oriented, and offensive. As such, the Board found that the Department acted appropriately in deciding to dismiss him from his employment.

Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Mr. Lanouette's appeal.

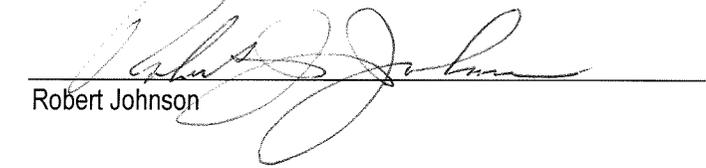
The New Hampshire Personnel Appeals Board



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