

State of New Hampshire



PERSONNEL APPEALS BOARD
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Appeal of Robert O. Lord

Docket #2001-T-12

NH Pari-Mutuel Commission

August 1, 2001

The New Hampshire Personnel Appeals Board (Rule, Johnson and Bonafide) met on Wednesday, May 16, 2001, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board) to hear the appeal of Robert O. Lord, a former employee of the New Hampshire Pari-Mutuel Commission. Mr. Lord, who was represented at the hearing by Michael C. Reynolds, SEA General Counsel, was appealing his February 13, 2001 termination from employment as a Laboratory Scientist III on charges that he willfully falsified his application for employment with the NH Pari-Mutuel Commission. JoAnne G. Dufort and Tracey Payne, Chief and Deputy Chief of Laboratory Services, appeared on behalf of the agency.

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

State's Exhibits

1. February 13, 2001, letter of termination issued to Mr. Lord
2. Employment Application dated October 2, 2000, submitted by Robert Lord to the NH Pari-Mutuel Lab
3. Employment Application dated September 14, 2000, submitted by Robert Lord to the Public Health Laboratories
4. Employment Application dated February 3, 1995, submitted by Robert Lord to the Department of Corrections
5. January 29, 2001, letter to Tracey Payne from Lisa Currier concerning Mr. Lord's job

assignments at the Department of Corrections

6. Telephone records provided by Agilent Technologies to Ms. Dufort by Steve Royce on January 26, 2001
7. Performance Summary for Robert Lord dated January 12, 2001
8. DOC Form completed by Robert Lord, signed February 14, 1995, as part of Mr. Lord's application for employment with the Department of Corrections

Appellant's Exhibits

- A. July 14, 1999 letter to Commissioner Henry Risley from Virginia Lamberton concerning reclassification of Mr. Lord's position

The following persons gave sworn testimony:

JoAnne G. Dufort, Chief of Laboratory Services, NH Pari-Mutuel Commission
Donald P. Taylor, SEA Field Representative
Robert O. Lord, Appellant

Standard of Review [Per-A 207.12 (b)]

"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"

Position of the Parties

Ms. Dufort described the Pari-Mutuel Commission's regulatory role, explaining the importance of honesty and trust in the Commission's relationship with the racing industry. She argued that almost immediately after the agency had hired Mr. Lord, a series of events took place that caused the agency to question his honesty. She argued that concerns about Mr. Lord's qualifications and past work experience also began to surface when it appeared that the appellant was having difficulty carrying out basic laboratory procedures, safety protocols, and testing methods. Ms. Dufort argued that the agency originally had intended to address its concerns about the appellant's honesty and the quality of his work through the normal performance management system. However, she argued, in the process of reviewing Mr. Lord's personnel file and preparing his performance evaluation, the agency uncovered evidence that Mr. Lord had falsified information on his application for employment.

Ms. Dufort argued that when the Pari-Mutuel Commission had offered Mr. Lord a position as a Laboratory Scientist, the agency believed that he had the education and experience suitable for the position. She argued that their review of his application for employment, their check on the references that he provided on that application, and the information that the appellant supplied during the selection interview did not disclose that the appellant had been fired from a previous position, nor did it disclose the fact that Mr. Lord lacked the requisite experience in method development that he claimed he had acquired while working at the Department of Corrections. Ms. Dufort argued that if the agency had known the complete truth about Mr. Lord's employment history, the agency would not have hired him.

Ms. Dufort argued that Mr. Lord's credibility was so severely damaged, the agency felt it had no choice but to terminate his employment in order to protect the integrity of racing in the state. She stated that having gathered sufficient evidence to support that conclusion, the agency scheduled a meeting with Mr. Lord, advised him of the charges, provided an opportunity for the appellant to discuss the termination, and gave the appellant a letter notifying him of his

immediate termination from employment.

Mr. Reynolds argued that the agency's decision to terminate Mr. Lord's employment was unjust and unlawful. Mr. Reynolds admitted that there were discrepancies between the applications that the appellant had submitted to the Department of Corrections, the Division of Public Health, and the Pari-Mutuel Commission. However, he argued, those discrepancies could not be construed as proof that the appellant had willfully falsified his application for employment or that the appellant had attempted to conceal or withhold any information from the Pari-Mutuel Commission.

Mr. Reynolds argued that by describing his separation from employment at Seragen, Inc., as a relocation, the appellant was simply trying to avoid discussing a painful period in his life when he was going through a divorce and undergoing treatment for depression. Mr. Reynolds argued that Mr. Lord had explained the termination on his prior application for employment at the Department of Corrections and believed that Ms. Dufort and Ms. Payne could have discovered that information by simply reviewing his personnel file and discussing his application with Department of Corrections staff. Mr. Reynolds argued that if Mr. Lord had been trying to withhold or conceal information about his employment with Seragen, it was unlikely that he would have identified John Dobecki, the supervisor who fired the appellant from Seragen, as the supervisor to contact for employment information.

Mr. Reynolds argued that according to Per 1001.08 (c), an appointing authority may not dismiss an employee until the appointing authority offers to meet with the employee to discuss the evidence supporting the dismissal, and the employer provides an opportunity for the employee to refute that evidence. In this case, he argued, the agency not only failed to apprise Mr. Lord of all the factors it considered in deciding to terminate his employment, including their belief that he was dishonest and their conclusion that he intimidated his co-workers, but they failed to disclose to him any of the evidence that they had gathered to support their decision to terminate Mr. Lord's employment. Mr. Reynolds asked the Board to find that prior to termination, the

appellant was entitled to notice and a fair opportunity to review the allegations and to refute the evidence against him.

Mr. Reynolds argued that if the Pari-Mutuel Commission had complied with the provisions of Per 1001.08 (c), Mr. Lord could have refuted the evidence and would have provided a reasonable explanation for his alleged misconduct. Having failed to do so, Mr. Reynolds contended, the agency deprived the appellant of an opportunity to demonstrate why his employment should not be terminated. As a result, he argued, the Pari-Mutuel Commission terminated Mr. Lord's employment in violation of rules adopted by the Director of Personnel. Mr. Reynolds argued that the agency's decision to terminate Mr. Lord's employment was unlawful, unjust, and unsupported by the evidence. He argued that in accordance with the Board's Rules, the Rules of the Division of personnel and the provisions of RSA 21-I:58, the appellant must be reinstated without loss of seniority or pay.

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

Findings of Fact:

1. In October, 2000, Mr. Lord applied for a position as a Laboratory Scientist with the Pari-Mutuel Commission Racing Laboratory.
2. In that application and in an application for employment with the Division of Public Health Services, Mr. Lord indicated that he had left a former position at Seragen, Inc., in 1995 because of relocation; he also identified his supervisor as John Dobecki.
3. In his February 3, 1995 application for employment with the Department of Corrections (State's Exhibit 4), Mr. Lord indicated that he had worked at Seragen, Inc. from October 1993 to January 1995, that his supervisor's name was Kay McDonald, and that his reason for leaving his position at Seragen was "termination."
4. As part of that application process, the appellant also completed a Department of Corrections form titled "Self Reported Background" (State's Exhibit 8) that the appellant signed and dated

February 14, 1995.

5. On that form, the appellant answered "yes" in response to the question, "Have you ever been fired from a job?" On the form, lie described his separation from Seragen as an involuntary termination.
6. Neither Ms. Dufort nor Ms. Payne had reviewed the appellant's personnel file or his earlier applications for employment with other State agencies when they offered Mr. Lord a position as a Laboratory Scientist at the Pari-Mutuel Commission Racing Lab, nor were they aware that he had provided information different from that which lie had supplied on State employment applications.
7. Joanne Dufort and Tracy Payne interviewed and hired Mr. Lord for the position of Laboratory Scientist III.
8. On or about November 3, 2000, while Mr. Lord was working on a piece of laboratory equipment, the password protect function on the equipment was activated.
9. Although Mr. Lord repeatedly denied that he had attempted to set up any security passwords, he did speak with a technician at Agilent Technologies on November 6, 2000 for assistance in deactivating a security password [State's Exhibit 6].
10. Ms. Dufort contacted Steve Royce of Agilent Technologies, confirming that Mr. Lord had called for assistance in deactivating a password on the GS/MS.
11. Mr. Royce forwarded written confirmation in a fax to Ms. Dufort dated January 26, 2001 [State's Exhibit 6].
12. Mr. Lord attempted to install an inlet port worth approximately \$70 that lie had in his possession on equipment used at the Racing Lab.
13. When questioned by Ms. Dufort about where lie had obtained the inlet port, Mr. Lord admitted that the part had come from the Department of Corrections.
14. Although the inlet port was incompatible with the equipment in the Department of Corrections laboratory, no one in the laboratory had authorized Mr. Lord to take the part with him to the Pari-Mutuel Commission Lab.
15. Mr. Lord's work performance at the Pari-Mutuel Commission Lab was below expectations.
16. In a performance evaluation dated January 12, 2001 that Mr. Lord refused to sign, Ms. Payne

- and Ms. Dufort described Mr. Lord's work performance as below expectations in quantity of work, quality of work, communications, dependability, cooperation, initiative, and safety.
17. Following the performance evaluation, Ms. Dufort and Ms. Payne reviewed information in Mr. Lord's personnel file in an effort to identify the reasons why he was unable to satisfactorily perform the basic duties of his position.
 18. Ms. Payne contacted the Department of Corrections for information about Mr. Lord's employment with that department, requesting an explanation of his responsibilities for method development in the DOC lab.
 19. Lisa Currier, Human Resources Administrator, sent Ms. Payne a letter dated January 29, 2001, in which she outlined Mr. Lord's responsibilities [State's Exhibit 5].
 20. Ms. Payne contacted Kay McDonald and Ms. Dufort contacted John Dobecki, both from Seragen, to determine who was the appellant's supervisor and to discuss the reasons for the appellant's termination from employment.
 21. Ms. Payne reported to Ms. Dufort that Ms. McDonald seemed uncomfortable during the conversation and was not willing to provide much information. Ms. Dufort found Mr. Dobecki to be "evasive" in his responses.
 22. Ms. Dufort and Ms. Payne concluded that Mr. Lord had willfully misrepresented information on his application for employment about his reasons for leaving Seragen, Inc., and about the extent of his duties and responsibilities at the Department of Corrections.
 23. Ms. Dufort and Ms. Payne advised the appellant on the morning of February 13, 2001, that they needed to meet with him that afternoon to discuss his termination from employment.
 24. Mr. Lord, his SEA Field Representative Donald Taylor, Ms. Dufort, and Ms. Payne met that afternoon to review the termination letter that they had prepared. Also present were Paul Kelly and a State Trooper.
 25. Mr. Lord and Mr. Taylor both assumed that the termination must be related in some fashion to the poor performance evaluation that the appellant had received.
 26. Neither Mr. Lord nor Mr. Taylor realized that the appellant was to be charged with willfully falsifying information on his application for employment.
 27. Apart from the letter of termination itself, the appellant was not provided copies of any of

the documents admitted into evidence as Slate's Exhibits 1 - 8.

Rulings of Law

- A. "Dismissal shall be considered the most severe form of discipline. An appointing authority shall be authorized to take the most severe form of discipline by immediately dismissing an employee without warning for offenses such as... (8) Willful falsification of agency records including, but not limited to... e. Applications for employment..." [Per 1001.08 (a) (8) e.].
- B. "No appointing authority shall dismiss a classified employee under this rule until the appointing authority: (1) Offers to meet with the employee to discuss whatever evidence the appointing authority believes supports the decision to dismiss the employee; (2) Offers to provide the employee with an opportunity to refute the evidence presented by the appointing authority... and (3) Documents in writing the nature and extent of the offense" [Per 1001.08 (c)]
- C. "If an appointing authority, having complied with the provisions of Per 1001.08(c), finds that there are sufficient grounds to dismiss an employee, the appointing authority shall: (1) Provide 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; and a. An appeal filed under the provisions of RSA 21-I:58 shall not stay the dismissal decision. (3) Forward a copy of the notice of dismissal to the director" [Per 1001.08 (d)]
- D. "If the personnel appeals board finds that the action complained of was taken by the appointing authority for any reason related to politics, religion, age, sex, race, color, ethnic background, marital status, or disabling condition, or on account of the person's sexual orientation, or was taken in violation of a statute or of rules adopted by the director, the employee shall be reinstated to the employee's former position or a position of like seniority, status, and pay" RSA 21-I:58, I].
- E. "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 [RSA 21-I:58, I].

Decision and Order

The appellant admitted that when he applied for employment with the Pari-Mutuel Commission, he made a conscious choice to list something other than "termination" as his reason for leaving Seragen. Mr. Lord described the information he provided about his separation from Seragen as "incomplete." However, the appellant recalled signing a form authorizing the Pari-Mutuel Commission to review his records and to discuss his application with the Department of Corrections and with former employers. He said that he fully expected them to do so. Mr. Lord testified that he listed relocation as his reason for leaving Seragen because it was one aspect of his separation, along with his being divorced and being fired from his job. During his testimony Mr. Lord said, "I just didn't want to bring it up. I didn't want to rehash that. I wanted to leave that behind me." Being fired from Seragen had not prevented the appellant from obtaining employment with the State of New Hampshire, and the appellant believed that after five years with the Department of Corrections, where he had acquired more relevant experience and more up-to-date training, his reason for leaving Seragen was less significant than it might have been five years earlier.

The evidence in this case indicates that "relocation" was the result rather than the reason that the appellant left Seragen, Inc. Nevertheless, the Board is not persuaded that the appellant's omission of that information on the application for employment with the Pari-Mutuel Commission constitutes willful falsification of an agency record sufficient to justify his immediate termination from employment. Not only should the agency have reviewed the appellant's file prior to making an offer of employment, the agency should have explored with the appellant his explanation for the omission before it decided to terminate his employment.

Similarly, if Mr. Lord had intended to conceal information about his termination from Seragen, it seems unlikely that he would have identified Mr. Dobecki as his supervisor, since Mr. Dobecki was the individual who actually dismissed him. As Mr. Lord explained, while John Dobecki was responsible for evaluating Mr. Lord's performance toward the end of Mr. Lord's employment at

Seragen, both Mr. Dobeclti and Ms. McDonald had been his supervisors.

The State's allegation that the appellant misrepresented his work history at the Department of Corrections is also unsupported by the evidence. Ms. Currier's January 29, 2001 letter [State's Exhibit 5], indicated that Mr. Lord's supervisor at the Department of Corrections was responsible for "method development." However, according to the former Personnel Director's July 14, 1999 letter to former Corrections Commissioner Risley [Appellant's A], by 1999, Mr. Lord had assumed responsibilities for, "developing new testing methods, performing research and for the development of new policies and procedures within the Gas Chromatograph/Mass Spectrophotometer Section." Although Ms. Dufort and Ms. Payne were obviously dissatisfied with Mr. Lord's still in method development, the evidence does not support the charge that he intentionally misrepresented his work experience.

The evidence reflects that Ms. Dufort and Ms. Payne had growing concerns about how honest or trustworthy the appellant might be, and whether or not they would be able to rely on any of the results of tests that he performed. The evidence also reflects that they had concerns about the appellant's willingness and his ability to follow the necessary testing protocols and safety procedures. While these problems bear directly on the appellant's ability to meet the work standard and could support a decision to dismiss the appellant, without proof by a preponderance of the evidence that the appellant willfully falsified his application for employment, in and of themselves, these concerns themselves are insufficient to support the appellant's termination.

Therefore, having considered the evidence and the arguments offered by the parties, the Board found that, "The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence" [Per-A 207.01 (b) (3)]. Accordingly, the Board voted unanimously to GRANT Mr. Lord's appeal, ordering him reinstated inmediately to his position at the Pari-Mutuel Commission. As such, the Board voted to GRANT Mr. Lord's appeal and order him reinstated to his position as a Laboratory Scientist III.

The agency readily admits that it provided none of the evidence to the appellant prior to his termination, and having failed to do so, they provided no opportunity for him to refute that evidence prior to his hearing before this Board. Further, while the agency claims to have dismissed the appellant for falsification of agency records, Ms. Dufort's testimony made it clear that the real reasons behind Mr. Lord's termination had more to do with an underlying belief on the agency's part that the appellant is not trustworthy and that he lacks the technical and the supervisory skills to perform his assigned tasks. Accordingly, the Board found that the termination also violated Per 1001.08 (c) in that the agency failed to disclose to the appellant any of the evidence upon which it relied in effecting his termination from employment, or to provide him an opportunity to refute that evidence.

As the US Supreme Court held in the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), "...the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Had the agency complied with the provisions of Per 1001.08(c) by meeting with the employee, informing him of the charges, and providing him an opportunity to review and refute the evidence upon which the agency later relied in terminating his employment, they would have afforded the appellant and themselves that "initial check against mistaken decisions." Having failed to do so, however, the agency reached decisions that were unsupported by the totality of the evidence.

Whereas the agency terminated Mr. Lord's employment in violation of Per 1001.08 (c), the appellant is also entitled to be reinstated without loss of seniority, status, and pay under the provisions of RSA 21-I:58, I:

"The employee shall be reinstated without loss of pay, provided that the sum 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.'

Finally, although the Board voted to GRANT Mr. Lord's appeal for the reasons set forth above, the Board makes no specific findings with respect to the performance issues raised during the course of the hearing. The decision, 'therefore, should not be construed as prohibiting the agency from taking other appropriate action as may be permitted by the Rules of the Division of Personnel.

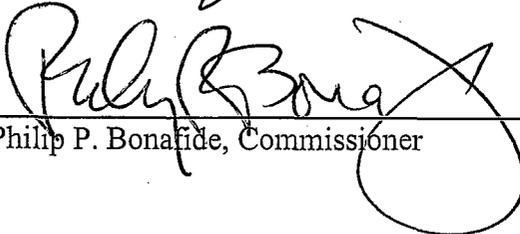
THE PERSONNEL APPEALS BOARD



Lisa A. Rule, Acting Chair



Robert J. Johnson, Commissioner



Philip P. Bonafide, Commissioner

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