

State of New Hampshire

WPPID621



PERSONNEL APPEALS BOARD
State House Annex
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF ROGER MAILHIOT
Response to Appellant's Request for Reconsideration
Docket #90-T-13

dated: December 6, 1990

On October 9, 1990, SEA General Counsel Michael C. Reynolds filed a request for reconsideration of the Board's September 19, 1990 decision reinstating Sgt. Roger Mailhiot, and reducing his discharge to a 6 months suspension without pay.

The appellant, in support of his request, argues that "Given the overtime and special details *Mr.* Mailhiot was working at the time, the Board's September 19, 1990 order in effect constitutes a fine of approximately \$26,000. Even considering only *Mr.* Mailhiot's base pay, the fine would be approximately \$18,000."

In its order of September 19, 1990, the Board noted that the State had presented the bite incident involving Sgt. Mailhiot and Theresa Markell as an offense of such an "egregious" nature that it rose to the level of an immediate, mandatory discharge, or in the alternative, of such a serious nature as to warrant discharge without warning under the optional discharge section of the Personnel Rules. The Board's order of September 19, 1990 addressed that argument as follows:

"On its face, this would seem a reasonable conclusion to reach had the Board been presented with evidence that without any provocation, a State Police Sergeant, employed in a supervisory capacity, had bitten a subordinate employee, and had intentionally caused her bodily injury. That, however, is not the evidence in this case and the Board, in the interest of fairness, considered the seriousness of the incident within the context of the work environment. ... On the other hand, the Board is not inclined to overlook the very serious nature of Roger Mailhiot's behavior, nor is the Board prepared to accept the appellant's argument that *Mr.* Mailhiot should be reinstated without loss of pay, seniority or other status, or to find that he has already been punished far beyond what should be expected from this incident. By his own admission, the appellant has committed a grievous error in judgment, and must be held accountable for it."

APPEAL OF ROGER MAILHIOT

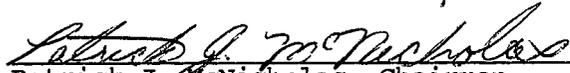
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The fact that Appellant was a highly paid ranking officer in the Division of State Police, whose half-year earnings might have reached \$26,000.00 is sufficient, in the Board's estimation, to illustrate the seriousness of his offense. Sgt. Mailhiot's indiscretion, unprofessionalism, and lack of judgment have created an enormous potential fiscal liability for the Division of State Police, and the Board is not inclined to reduce the discipline imposed in its decision to reinstate him to his position at the Department of Safety.

As a final matter, the Board had already indicated in its original decision that were it not for Ms. Markell's complete lack of credibility as a witness in this matter, and the fact that Sgt. Mailhiot had an apparently unblemished record prior to the incident involving, the Board would have voted to uphold the decision to discharge appellant from his position.

Based upon the foregoing, appellant's motion is denied, and the Board's earlier ruling is affirmed.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett

cc: Michael C. Reynolds, SEA General Counsel
Robert E. Dunn, Jr., Assistant Attorney General
Virginia A. Vogel, Director of Personnel

State of New Hampshire

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APPEAL OF ROGER MAILHIOT
Department of Safety - Division of State Police

Docket #90-T-13

dated: September 19, 1990

The New Hampshire Personnel Appeals Board (McNicholas and Bennett) met Tuesday, August 21, 1990, to hear the appeal of Roger Mailhiot, a former employee of the Department of Safety, Division of State Police, who alleged that his resignation from employment was a de facto termination. Mr. Mailhiot was represented at the hearing by SEA General Counsel Michael C. Reynolds. Assistant Attorney General Robert E. Dunn appeared on behalf of the Department of Safety, Division of State Police.

The Chairman, before entertaining discussion on any preliminary matters, noted that a quorum of the Board was present for the hearing, and asked if the parties knew of any reason why either member of the Board should not hear Mr. Mailhiot's appeal on its merits. Neither party objected.

Before offering an opening statement, the Appellant objected to submission of State's Exhibits marked A - F, and further argued that the letter of termination which would have been issued to Mr. Mailhiot, had he not offered his written resignation, should be included in the record. The Appellant also asked that the Board order the State to turn over to him the entire investigative record in this matter.

The State responded that the Appellant had previously indicated there would be no objection to the exhibits if the documents had been generated outside of the scope of the investigation. The State argued that its exhibits had all been generated prior to March 14, 1990, the beginning date of the investigation and that the later inclusion of those documents into the investigative report should not result in their being excluded from the record of Mr. Mailhiot's appeal. The State argued that the question of whether or not certain documents should be admissible under the provisions of RSA 516:36 need not be reached, inasmuch as all the documents in question predated March 14, 1990.

page 2

As to the investigative file itself, the State argued that Terry Markell's employee record should not be admitted, as it was not relevant to the bite incident on March 7, 1990; that Markell might be a hostile witness; and that Terry Markell might have certain privacy interests in her file to which the appellant would not be entitled.

With regard to the letter of termination, the State argued since the letter had not been formally issued, it should not be admissible. The State again raised its objection to the Board hearing Mr. Mailhiot's appeal, arguing that despite the Board's earlier denial of the State's Motion to Dismiss, the appellant had not been discharged but had voluntarily resigned from his position, and therefore the Board lacked subject matter jurisdiction. Although a draft of a termination notice had been shown to the appellant on the date of his resignation, the letter itself had not been formally issued and might have been amended at any time prior to actual issuance. For those reasons, the State insisted that the draft termination letter should not be admissible.

The Appellant argued that RSA 516:36 should apply in this case, in that the statute refers to the internal appeals process in the Department of Safety. The appellant also argued that Ms. Markell's employee record and employment history should be a part of the record of the hearing, and any separate charges against Ms. Markell were relevant to the question of her credibility. The appellant insisted the issue of who instigated the incident which resulted in Terry Markell being bitten by Mr. Mailhiot, and how serious the bite actually was remained an issue in the appeal. As to Ms. Markell's privacy interests, the appellant contended that Markell had already waived her privacy interests by bringing suit in superior court as a result of the incident on March 7th. Finally, the appellant argued that the question of subject matter jurisdiction had already been decided in the Board's first notice, and again in the prehearing conference. Therefore, the appellant argued that the jurisdictional question should be closed, allowing the parties to proceed with the merits of the case.

Finally, the appellant argued that the letter of discharge had been handed to Mailhiot; that review of the letter, whether in draft or final form, had precipitated his resignation; and that the substance of the letter itself was relevant to appellant's allegation that his resignation was the direct result of coercion. Therefore, the appellant argued that the termination letter must be made a part of the record if the Board were to have a realistic view of the circumstances surrounding his resignation.

The Board ruled as follows on the preliminary matters:

- 1) The State's Motion to Dismiss was again denied.
- 2) Appellant's objections to State's Exhibits A - F were overruled.
- 3) The Board directed the State to give the appellant a copy of the letter of termination which was shown to him on the date of his resignation. The issue of its admissibility would be held in abeyance until the appellant wished to offer it into evidence.
- 4) The Board directed the State to submit the complete investigative file for an in camera review by the Board prior to the Board ruling on appellant's access to the file, or its admissibility as part of the record of the hearing.

Attorney Dunn asked that the Board answer the State's Motion for Clarification before proceeding with the hearing. The appellant argued that the State Police, through the Motion for Clarification, sought to preclude the Board from hearing testimony or receiving evidence on the "atmosphere" in Troop B where the bite incident took place. Attorney Reynolds reiterated his position that the Board would be unable to reach an informed decision without understanding what constituted "normal" behavior in State Police barracks, and in Troop B in particular.

Mr. Bennett, speaking for the Board, noted that both parties had presented the matter to the Board as a question of the propriety of Mr. Mailhiot's separation from service. The Board, therefore, would allow the presentation of any evidence which it deemed relevant to that issue. In the interest of judicial economy, rather than pursuing further argument on the marked exhibits, the Board would allow individual objections from the parties at the time that evidence or testimony was presented. The Board further noted that evidence might be deemed relevant if it were intended to show that Mr. Mailhiot's resignation was given under duress.

As a last preliminary matter, the Appellant asked that the witnesses be sequestered, arguing that there remained some factual dispute concerning the incident on March 7, 1990 when Roger Mailhiot bit Terry Markell. The State objected to sequestering the witnesses, claiming that the facts were not actually in dispute. The Board, however, granted the appellant's request, noting that as a general practice the Board allowed sequestration.

APPEAL OF ROGER MAILHIOT
Department of Safety - Division of state Police
Docket #90-T-13

page 4

After a brief recess to review the investigative file, the Board denied the appellant's request that the balance of the file be turned over to him. The Board found that the information contained in the file would not materially affect Mr. Mailhiot's defense of his appeal, and would not adversely affect the presentation of his case.

Assistant Attorney General Dunn, on behalf of the State, argued (1) that Mr. Mailhiot had viciously bitten a subordinate employee without provocation and without explanation; (2) that the appellant had seriously injured the employee; (3) that the appellant had committed an offense categorized as a mandatory discharge offense in the Personnel Rules; (4) that the State had offered the appellant the opportunity to resign rather than be discharged for cause; (5) and that the appellant voluntarily tendered his resignation.

Attorney Reynolds, on behalf of the appellant, argued (1) that Mr. Mailhiot has a record of 22 years of excellent service to the State; (2) that he freely admitted to making a serious error in judgment by engaging in horseplay with Terry Markell and nipping her on the arm; (3) that Terry Markell initiated the horseplay; (4) that Terry Markell's characterization of the incident and injury was not altogether credible; (5) that Mr. Mailhiot had not attempted to injure Terry Markell; and (6) that absent the intent to injure, and in light of the general behavior at the barracks, the offense did not require discharge under either the mandatory or optional discharge provisions of the Rules of the Division of Personnel. Attorney Reynolds further argued that even if mandatory discharge were prescribed by the Rules, the Board had the statutory authority to consider the facts surrounding the incident and reduce the discipline accordingly.

Analysis of testimony:

The Board found Theresa Markell, the complainant in the original charges against Roger Mailhiot, to be the least credible of any of the witnesses appearing before the Board during the course of the hearing. Since the seriousness of the bite and the circumstances during which the bite occurred have significant bearing upon the propriety or impropriety of a discharge in this case, and since the only witnesses to the actual incident were Sergeant Mailhiot and Theresa Markell, the credibility of these two witnesses is critical to the outcome of the appeal.

At the time of the bite incident, by her own admission, Ms. Markell was under investigation for falsification of her own payroll and leave records, as well as for unauthorized use of the office WATIS line and the destruction of computerized records of those calls. Ms. Markell was aware of the investigation, and that the investigation itself had been initiated by Sergeant Mailhiot.

The record also reflects that following the incident, after Ms. Markell had filed civil suit for sexual harassment against Sergeant Mailhiot and the New Hampshire Division of State Police, Ms. Markell had discussed the suit with Diane Panzieri, a co-worker and a witness in this case. Ms. Markell told Ms. Panzieri she was "in the money". When Ms. Panzieri told Markell to "shut her mouth", Markell began singing, "I'm in the money, I'm in the money."

Roger Mailhiot, who had an unblemished record as a member of the New Hampshire State Police for 22 years, was described by Lt. Solloway, his immediate supervisor, as "one of the finest human beings I have ever known", although he noted he "...think[s] Roger is a little crude..." Solloway also testified that prior to the investigation into Markell's behavior, and prior to the bite incident, Ms. Markell had never reported or alleged any improper behavior or sexual harassment by Mailhiot.

Captain Nicholas Halias, State Police Southern Division Commander, testified that Roger Mailhiot was a dedicated trooper, a man of great integrity, and that Halias would not doubt his veracity for any reason. When asked if Halias believed Mailhiot had attempted to injure Theresa Markell, he responded that he did not believe Mailhiot would attempt to injure anyone.

Regarding the work environment at Troop B, the Board heard considerable amounts of testimony, from both the State's and appellant's witnesses, regarding what was euphemistically described as "locker room" antics at the barracks. The Board, in drafting its order in this matter, determined that without resorting to a verbatim reproduction of the hearing, summarizing the testimony of each individual witness would serve no useful purpose. The Board has, therefore, only highlighted that testimony which goes to the weight of the evidence, and the credibility of the two principal witnesses, the complainant Theresa Markell and the appellant, Roger Mailhiot.

The Board notes that it found the behavior of both the uniformed and non-uniformed employees of Troop B, as described by both the State's and the appellant's witnesses, to be crude and unprofessional at best. What Capt. McCarthy characterized as "locker room", and considered to be the norm in most police barracks can not be ignored in the Board's consideration of this matter. Similarly, the Board can not ignore Ms. Markell's participation, and in some instances, instigation of this sort of behavior in determining which representation of the incident to be more credible.

page 6

Ms. Markell had originally testified under oath that she did not engage in "horseplay", either as a part of the bite incident or in the general context of employment with Troop B. The remainder of the witnesses, however, describe Ms. Markell as a willing participant and, on more than one occasion, the instigator of such behavior. She had testified, for example, that although she had brought molded chocolate facsimilies of male and female genitalia into the office, she had kept them in her desk, and had never displayed any of them on her desk. The overwhelming body of testimony reveals that she did display them on her desk until instructed to get them out of sight by the Lieutenant.

Ms. Markell, during the course of the investigation into her charges of sexual harassment, had informed the Department of Safety that Brenda Prochillo, a former troop secretary, had resigned because she had been harassed by Sergeant Mailhiot. Ms. Prochillo, to the contrary, testified that she had never been harassed by Mailhiot. She further testified that during her tenure with Troop B, Mailhiot had been very protective of her and had always attempted to minimize any vulgar language and behavior in her presence. Ms. Prochillo testified that she had resigned from her position at Troop B because she had married one of the troopers, and she and her husband had felt it would be unwise for them to both work out of the same barracks.

In regard to the bite incident itself, Ms. Markell testified that when Mailhiot bit her, "He had to reach over." She also testified, "I had to pull out [from the bite]. At first I was just shocked, I just felt this terrible pain and I didn't even know what was going on, and then I just pulled my arm away and I screamed, 'You bit me.'" She insisted she kept saying "how much it hurt" and "I can't believe you did that. That's going to make a bad bruise." She then testified that she "was in tears and [she] ran out of the office". She stated that, "people, a couple of people heard me scream, so they came forward and, it was just about time to go home because it was roughly three thirty and we leave at four, and I drove home."

Ms. Markell's version of the events on March 7, 1990 differ distinctly from that given by the State's witness, Diane Panzieri. According to Ms. Panzieri, immediately after the incident, Ms. Markell sought her out and was laughing when she said, "He bit me. The son-of-a-bitch. He just bit me." According to Ms. Panzieri, Markell then asked her into the ladies' room to show her the bite. She commented to Ms. Panzieri that it would be "much worse" the following day. Ms. Panzieri made no mention of Ms. Markell being in tears at any point following the incident.

page 7

Ms. Markell testified that she "... was in tears all the way home and as soon as [she] got home [she] called Lt. Solloway at home and told him what happened." She testified that Lt. Solloway had instructed her to write up a memo as soon as she came in the next morning, and that if there were a mark still showing, he'd have someone photograph it.

Lt. Solloway made no reference in his testimony to Ms. Markell being distraught, nor to her being in tears when she telephoned him at his home. Lt. Solloway testified he'd suggested to Markell that if there were still a mark showing in the morning, he'd have someone take photographs of the injury.

Although Ms. Markell indicated in her testimony that the suggestion of photographing the bite was made by Solloway on the night of the incident, she claims in her memo of March 13, 1990 (State's Exhibit B) that immediately after the bite incident, she told Mailhiot, "That's going to leave a mark! I'm going to take a picture of it."

There are sufficient discrepancies between Ms. Markell's testimony and that of Ms. Panzieri, Sergeant Mailhiot, and Lt. Solloway to raise serious questions about Ms. Markell's credibility in general. The Board, therefore, is inclined to accept Sergeant Mailhiot's representation of the incident itself to be more truthful than Ms. Markell's.

The Department of Safety insisted that Mailhiot never suggested that the bite incident had occurred in the context of "horseplay". Sgt. Miles, the investigator, testified that Mailhiot had given no reason for biting Markell other than saying that "the arm was there". Miles admitted, however, he believed Mailhiot had claimed to have bitten Markell "kiddingly" in Mailhiot's memo to Col. Presby. Miles testified that Mailhiot had told him during their investigative interview that the bite was not done maliciously and that Mailhiot wished he hadn't done it. He testified that he didn't believe Mailhiot had ever told him specifically that the bite had occurred in the context of "horseplay".

A copy of the March 10, 1990 memo from Roger Mailhiot to Col. Presby was submitted as Appellant's Exhibit 4. In that memo, Mailhiot described the bite incident to Col. Presby as follows: "...at this pint her right biceps was brushing against my chin, I kiddingly, nipped at the arm that was in my face." Although Col. Presby testified that he had not seen this particular memo prior to his decision to discharge Roger Mailhiot, it is apparent that the memo was written and was reviewed as a part of the investigation.

page 8

Analysis of closing arguments:

The State asks that the Board consider the "egregious" nature of Sergeant Mailhiot's actions as sufficient to rise to the level of an immediate, mandatory discharge, or in the alternative, of such a serious nature as to warrant discharge without warning under the optional discharge section of the Personnel Rules. Further, the State asks that the Board find that the appellant, without coercion, offered his resignation when faced with the facts of his discharge.

On its face, this would seem a reasonable conclusion to reach had the Board been presented with evidence that without any provocation, a State Police Sergeant, employed in a supervisory capacity, had bitten a subordinate employee, and had intentionally caused her bodily injury. That, however, is not the evidence in this case and the Board, in the interest of fairness, considered the seriousness of the incident within the context of the work environment.

The behavior of the staff stationed at Troop B is not above reproach. While that is not at issue here, it certainly paints a different picture of the incident than that originally presented in the State's Motion to Dismiss. While the sort of "locker room" atmosphere described by Capt. McCarthy, Lt. Solloway and Ms. Panzieri does not give any employee leave to engage in as poor an exercise of judgment as that demonstrated by Sergeant Mailhiot on March 7, 1990, it undoubtedly contributed to the likelihood that an incident of this sort could occur.

On the other hand, the Board is not inclined to overlook the very serious nature of Roger Mailhiot's behavior, nor is the Board prepared to accept the appellant's argument that Mr. Mailhiot should be reinstated without loss of pay, seniority or other status, or to find that he has already been punished far beyond what should be expected from this incident. By his own admission, the appellant has committed a grievous error in judgment, and must be held accountable for it.

STATE'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

Findings of Fact:

1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, and 18 are granted.

15 is granted only to the extent that Ms. Markell left the office. The characterization that she was "upset" is denied.

4, 17, 19, and 21 are denied.

20 and 22 are neither granted nor denied.

Rulings of Law:

C, D, H, and I are granted.

A, B, E, F, G, and K are denied.

J is denied within the context of the instant appeal, in that the Board would first have to assume "workplace" to mean a professional work environment in which "horseplay" and "locker room" behavior are the exception and not the norm.

APPELLANTS REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

Findings of Fact:

1, 2, 3, and 6 are granted.

5 is denied.

4 and 7 are neither granted nor denied.

Rulings of Mw:

1, 2, 4, 5, and 6 are granted.

7, 8, 9 and 10 are denied.

3 is neither granted nor denied.

FINDINGS AND ORDER OF THE BOARD

N.H. RSA 21-I:58, I provides, in pertinent part:

"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."

The Board found that Sergeant Mailhiot committed a grave error in judgment, and certainly conducted himself in a dangerously unprofessional manner, when he bit Ms. Markell, and followed that action with an obscene remark. The Board did not find, however, that Sergeant Mailhiot's behavior constituted "fighting" or "attempting to injure", or that Sergeant Mailhiot's behavior, within the context of the work environment, could be deemed conduct rising to a level consistent with either mandatory or optional discharge.

Similarly, the Board refuses to accept the appellant's argument that his offense should be considered only serious enough to warrant a letter of warning. Further, the Board will not accept the preposterous suggestion that Sergeant Mailhiot's behavior, even within the context of the workplace, rises only to the level of a letter of warning. Equally preposterous, in the Board's view, is the suggestion that the appellant could only have been discharged upon receipt of a third letter of warning for the same offense, particularly when the offense involves biting a fellow employee.

The Board hereby orders that the appellant, Roger Mailhiot, be reinstated effective October 26, 1990, following a six-month suspension without pay. In so doing, the Board found that as an officer in the State Police, and as a supervisor of both uniformed and non-uniformed personnel, Sergeant Mailhiot engaged in conduct of so unprofessional a nature as to warrant such a suspension.

Given Sgt. Mailhiot's less than amicable working relationship with Ms. Markell, his charges that she had falsified her own payroll and leave records and his charges that she had destroyed evidence of her own misuse of State Police WATIS service, the appellant demonstrated dangerously poor judgment by engaging in any horseplay with this employee. Not only did Mailhiot conduct himself in a highly unprofessional manner, but and in so doing, exposed both himself and the Division of State Police to civil suit arising from charges of sexual harassment by an employee whose honesty and trustworthiness Mailhiot himself had already questioned.

APPEAL OF ROGER MAILHIOT
Department of Safety - Division of State Police
Docket #90-T-13

page 11

In ordering Sgt. Mailhiot's reinstatement, the Board is mindful of the State's obligation to remove from the workplace any employee who fights with or attempts to inflict injury upon a co-worker. If Col. Presby believed Sgt. Mailhiot to have viciously bitten Ms. Markell, he would have been correct in his decision to order Mailhiot's immediate dismissal.

The Board believes that in order for Col. Presby to have decided to discharge Mailhiot under the mandatory discharge rules, he must not have had all the information generated by or eventually incorporated into the investigative record. The Board believes that had Col. Presby been fully informed, he would have ordered a less severe disciplinary action. If, however, Col. Presby did have all the information provided to the Board as evidence in this appeal, then the Board must conclude that the Colonel's decision was in error, or that he considered additional information which the State declined to present as part of its case.

THE PERSONNEL APPEALS BOARD


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