

State of New Hampshire



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

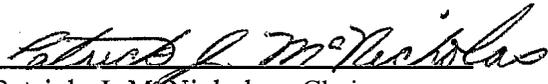
Appeal of Wayne Martel
Response to State's Motion for Rehearing
and
Appellant's Objection
Docket #93 - T-15 35

June 1, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, June 1, 1994, to consider the Motion for Rehearing filed by Assistant Attorney General William McCallum, and the Appellant's Objection, filed by SEA General Counsel Michael Reynolds on behalf of the appellant, Wayne Martel.

After careful consideration of the Motion and Objection, the Board found that there was no new evidence or argument which would support granting the State's Motion for Rehearing. Accordingly, the Board voted unanimously to deny the Motion. In so doing, the Board also voted to affirm its April 21, 1994 decision in this matter, reinstating the appellant to his position of Youth Counselor II.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Robert J. Johnson, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
William McCallum, Assistant Attorney General
Michael C. Reynolds, SEA General Counsel

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APPEAL OF WAYNE MARTEL DOCKET #93 -T-35

Division for Children and Youth Services
Youth Detention Services Unit

April 21, 1994

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Rule) met Wednesday, April 13, 1994, to hear the termination appeal of Wayne Martel, a former employee of the Youth Detention Services Unit of the Division for Children and Youth Services. Mr. Martel, who was appealing his May 18, 1993 termination by receipt of a final warning for continued unsatisfactory work performance, was represented at the hearing by SEA Legal Intern Linda Chadbourne. The Division for Children and Youth Services was represented by Sandra Platt, Human Resources Administrator.

Ms. Platt argued that the evidence would prove Mr. Martel had been continually counselled about his disruptive behavior, and that when the appellant continually failed to take corrective action as outlined in his written warnings, the Youth Detention Services Unit (YDSU) had no other option but to terminate his employment. Ms. Chadbourne argued that Mr. Martel did receive several warnings, but that the warnings did not reflect occurrences of the same offense, thereby invalidating the termination. She noted that none of the warnings, except that which resulted in his termination, had been appealed or addressed through the process for informal settlement of disputes authorized by the Rules of the Division of Personnel, Part Per 202.

Paul Nugent, Detention Supervisor, testified that the YDSU is a 23 bed secure detention facility for juveniles who commit delinquent offenses and are awaiting trial or sentencing. Mr. Nugent testified that delinquent offenses are those for which an adult could be charged with a crime, including as murder, attempted murder, assault, or felonious sexual assault. He indicated that the purpose of the unit is to detain, not to rehabilitate youth who are incarcerated at the facility. He testified that the unit is the only secure youth detention facility in the State.

Mr. Nugent testified that Youth Counselors at the facility spend most of their time interacting with the youth and staff. They are expected to monitor the behavior of the juveniles and serve as role models for the youth. He testified that staff are responsible for not engaging in a course of conduct, ranging from rudeness to horseplay, complaints or discussion of escapes, which would not be tolerated in the youth. He testified that Youth Counselors also need to work well with other staff members, as they provide security and support for other staff on shift. Mr. Nugent testified that because the unit is a secure detention center rather than a

treatment center, and because the youth housed at the unit could pose a threat to themselves and to others if they were to escape, the primary focus is on the security of the facility.

Mr. Nugent said that the Youth Counselor II supplemental job description and the Program and Staff Handbook outline the expectations for Youth Counselors. He testified that staff all receive training in professionalism in addition to on-going, task specific training in areas such as mechanical restraint (use of handcuffs). Mr. Nugent testified that unit records verified that Mr. Martel had attended the relevant training.

Brad Asbury, the YDSU House Leader, testified that Mr. Martel is very likeable and was popular with the residents. He described Mr. Martel as "being good with kids in a lot of respects". Mr. Asbury testified that when he had counselled the appellant in connection with the various verbal and written warnings he had received, Mr. Martel had never denied any of the conduct which resulted in his written warnings. He testified that Mr. Martel always insisted he would "try harder", and Mr. Asbury always tried to give the appellant "a break". Mr. Asbury testified that he always hesitated to undertake formal disciplinary proceedings, and was nicknamed "Mr. Easebury" because of it. He testified that Mr. Martel's conduct resulting in the November, 1992 warning was sufficient for termination, but the appellant had talked him out of it. Mr. Asbury testified that if it had been any other employee committing the kinds of offenses committed by Mr. Martel, he probably would have disciplined him sooner. Mr. Asbury testified that although Mr. Martel was very good at counselling residents who were distraught or homesick, his overall work performance was spoiled by his inappropriate behavior in front of the residents and staff. Mr. Asbury described the Youth Counselor's function as a role model as approximately 50% of the job, and said that if a Youth Counselor can not perform half the job, he can't be a Youth Counselor.

Mr. Martel received his first written warning for unsatisfactory work on November 10, 1992, on charges that he called one of the residents a crybaby and engaged him in a verbal altercation during which the youth threatened to assault Mr. Martel. According to the charges, while the youth was being restrained by several of the other Youth Counselors, the appellant taunted him and made provocative comments categorized as verbal abuse and threatening, both violations of the Youth Services Center Abuse and Neglect Policy. In the warning, Mr. Martel was advised that his performance failed to meet reasonable job expectations.

The letter of warning concluded by advising Mr. Martel that he had fifteen days in which to initiate the procedures for informal settlement of disputes if he took exception to the warning, otherwise, it would be assumed that he acknowledged the warning was justified. Mr. Martel did not initiate an appeal.

Mr. Martel received his second letter of warning for unsatisfactory work on January 13, 1993, arising out of a series of incidents beginning on December 15, 1992. Mr. Martel allegedly misreported a resident's behavior during a twelve hour long "restriction". When the inaccuracy was reported by a fellow staff member, Mr. Martel was required to rewrite his "progress notes" for that resident. Fifteen days later, Mr. Martel was also cited for unprofessional behavior as a result of allegedly vulgar conduct while exiting the staff bathroom. Six days later, on January 6, 1993, Mr. Martel was accused of engaging in disruptive, distracting behavior during staff training in "Crisis Management" and during the staff meeting which followed, by reading a book during the training, writing notes to a co-worker about wanting to "get out of here" and

later commenting that he would probably be assigned to a less desirable schedule because of his conduct.

The resulting letter of warning advised Mr. Martel that his performance as a Youth Counselor II failed to meet reasonable expectation. He was informed that unless he took immediate corrective action, he would be subject to additional discipline, up to and including termination. He was advised that he had fifteen days in which to initiate the procedures for informal settlement of disputes if he took exception to the warning, otherwise, it would be assumed that he acknowledged that the warning was justified. Mr. Martel did not initiate an appeal.

On March 5, 1993, Mr. Martel received a third letter of warning and notice of proposed suspension for continued unsatisfactory work performance. This warning arose from conduct following the appellant's request for annual leave. Mr. Martel had requested leave and was advised that he would need to find someone willing to cover his shift on compensatory time in order to have the leave granted. The agency charged that he did not transmit that information to the fill-in employee appropriately, and in the ensuing discussion, on February 11, 1993, Mr. Martel allegedly commented in front of residents that he "was tired of being jerked around" about his leave. A little more than a week later, he met with House Leader Brad Asbury and Assistant House Leader Wayne Eigabroadt to discuss his performance, including the leave incident. On February 22, 1993, one of the residents complained of the appellant's behavior during the news hour.

Mr. Martel was advised that he would be suspended without pay for one day. He was also directed, within thirty days, to provide a written plan of corrective action. He was informed that the plan should contain "specific steps" which would help him "avoid additional disciplinary action". He was told to include a time frame in which the corrective action would be completed.

Again, Mr. Martel was advised that failure to take corrective action would result in additional discipline, up to and including his discharge from employment. He was again advised that he had fifteen days in which to initiate the procedures for informal settlement of dispute if he took exception to the warning, otherwise the agency would assume that he acknowledged the discipline was justified. Mr. Martel did not initiate an appeal.

Mr. Martel received his final warning and notice of dismissal on May 18, 1993, for continued unsatisfactory work performance, and for receiving three letters of warning during the preceding two years for the same offense. The final warning arose from a series of allegations ranging from inappropriate remarks about food quality which were overheard by the residents, to the inappropriate and unsafe use of handcuffs during one of his shifts at the facility. The agency alleged that Mr. Martel had told a co-worker he had a "stack" of pre-signed doctor's notes to cover his unscheduled absences due to illness, and that he had discussed earlier disciplinary action by telling a supervisor and a co-worker that "only real men get three page letters of warning". The agency argued that such comments only served to undermine the disciplinary process and lower employee morale. The agency also complained that Mr. Martel had made remarks concerning food quality to the residents.

The most serious charge is contained in the final warning. Mr. Martel allegedly was observed on May 14, 1993, by the evening shift supervisor, placing a handcuff on his own wrist while

he was taking residents to the gym. In addition, while he was in a hallway adjacent to the stairwell the residents would use to get to the gym, two staff persons allegedly overheard Mr. Martel saying, "If anyone comes in here I'll kill them." Shortly thereafter, he allegedly remarked, "I've got the keys, let's get out of here" and "Let's raise some hell".

According to the charges, even after he had been warned about the handcuffs, he again placed one of the cuffs on his own wrist. The agency argued that the inappropriate use of the handcuffs represented a security risk by possibly impeding his ability to respond in a crisis, leaving the other Youth Counselors short-handed if there were an escape attempt.

Mr. Martel was advised in the May 18, 1993 letter of termination that he had fifteen days in which to initiate an appeal to the Personnel Appeals Board. A notice of appeal was filed on his behalf by SEA Legal Intern Linda Chadbourne by letter dated June 1, 1993. In the notice, Ms. Chadbourne stated that Mr. Martel denied the allegations made in his letter of termination, and that he had not, at any time, posed a security risk by handcuffing himself in front of the residents. She also argued that he never claimed to have presigned doctor's notes in his possession, and did not commit any of the offenses alleged in the letter of termination. She argued that the appellant had consistently been a positive role model and had adhered to other requirements in his job description so to as meet the work standard. Ms. Chadbourne asked the Board to find that the behavior cited in the letter of termination never rose to a level so severe as to warrant termination.

Mr. Martel testified that Youth Counselor positions are very stressful. He said he engaged in "horsing around" to break the tension among staff, but that he tried to "keep it down" whenever there were residents around. Mr. Martel said he had never appealed the first three warnings because he "didn't want to make waves". Mr. Martel insisted that the remark he made about being "jerked around" on his leave was made to a supervisor, not in front of any residents, and he felt there was nothing inappropriate about discussing his leave requests with his supervisor. Mr. Martel discounted most of the other allegations of inappropriate behavior as exaggerations of his conduct by staff who wanted to see him disciplined.

With regard to the allegation about the handcuffs, Mr. Martel admitted that he had placed a handcuff on his own wrist while practicing a technique which had been demonstrated to staff members, but said he didn't believe it would represent any real impediment in the event of an emergency. He said he believed he was too big for most of the residents to attempt to use the other cuff to restrain him, and said he did not feel his actions represented a real security risk. In each case, Mr. Martel testified that his conduct did not rise to the level of "a fireable offense".

The State argued that Mr. Martel's conduct over the period in question constituted an on-going failure meet performance expectations, and that each instance represented unsatisfactory work. The appellant argued that the Division for Children and Youth Services had failed to meet its burden of proving that on-going discipline represented warnings for "the same offense".

Per 1001.03 (a) of the Rules of the Division of Personnel states:

An appointing authority shall be authorized to use the written warning as the least severe form of discipline to correct an employee's unsatisfactory work performance for

offenses including, but not limited to:

- (1) failing to meet the work standard
- (2) arriving late for work or leaving work early
- (3) Being absent without approved leave or proper notification
- (4) excessive unscheduled absences
- (5) using obscene language
- (6) exhibiting uncooperative or disruptive behavior
- (7) sexual harassment
- (8) exhibiting physically or verbally abusive behavior in the workplace
- (9) lack of dependability
- (10) working unauthorized overtime
- (11) failure to immediately report to the appointing authority the expiration of a license or certificate required by the class specification or supplemental job description for performance of the duties of a position

The November 10, 1992, letter of warning cites unsatisfactory work performance as a result of verbal abuse and threatening in violation of the Youth Services Center Abuse and Neglect policy, and a failure to meet reasonable job expectation. The January 13, 1993 warning cites unsatisfactory work performance arising from disruptive and unprofessional conduct, as well as poor work performance in the areas of role modeling and professionalism. The third warning, dated March 5, 1993, again cites poor work performance in the areas of unprofessional and inappropriate behavior in front of residents and staff. None of these warnings was appealed. The final warning, dated May 18, 1993, cites continued unsatisfactory work performance by a demonstrated inability to work cooperatively with co-workers, inappropriate behavior in front of YDSU staff and residents, and failing to serve as an appropriate role model for youth at the facility.

The work standard at the Youth Detention Services Unit is clearly described in both the supplemental job description for Youth Counselor II, the "Accountabilities" of which are listed as follows:

- * Works with youth counselors in maintaining a safe, secure and humane environment for detained juveniles.
- * Participates in recreational activities and interacts with residents, serving as a positive role model.
- * Monitors residents' family visits to assure compliance with detention program policy.
- * Evaluates residents' behaviors, holds them accountable for committing rule violations and rewards them for exhibiting positive behavior, using an established behavior program.
- * Completes resident admission forms, orients new residents to the program and provides documentation of resident behaviors and significant incidents.
- * Demonstrates the ability to work productively with other staff as a team member and may be designated as shift supervisor by the house leader.
- * When necessary, required to physically control aggressive and sometimes assaultive residents.
- * Completes miscellaneous tasks assigned by supervisory staff.

In spite of the State's contention that the offenses all arise from a demonstrated inability to perform the required work satisfactorily, the Board found that the offenses were not sufficiently similar to constitute "the same" offense as contemplated by the rules. Although each of the warnings refers to inappropriate behavior with residents and staff at the YDSU, they are, in fact, separately listed types of offenses.

The charged offense in the first warning more closely resembled the offense listed in Per 1001.03(a)(8) "Exhibiting physically or verbally abusive behavior in the workplace" and violation of a posted or published agency policy than the charge of "unsatisfactory work". Insofar as neither party offered the policy itself into evidence, the Board has no facts in evidence upon which to find that the violation constituted a violation more serious than a letter of warning offense. The level of conduct described by Mr. Martel's second and third letters of warning more closely resembled the offense listed in Per 1001.03(a) "uncooperative and disruptive behavior" than the broad charge of "unsatisfactory work". The fourth, and final letter of warning describes conduct which would best be described by Per 1001.03(a)(6) "exhibiting uncooperative and disruptive behavior" and for violation of a posted or published agency policy. Again, neither party offered into evidence any facts which would allow the Board to determine that such a violation of posted or agency policy warranted more than a letter of warning. On the evidence, the Board found that the last three letters of warning more properly should have been issued for "exhibiting uncooperative and disruptive behavior" by failing to work cooperatively with fellow staff and constantly violating the code of conduct for which the residents are held accountable.

While the appellant has argued that the letters of warning were improperly issued for "unsatisfactory work" rather than the specific offenses described in Part Per 1001, or that the warnings were not "for the same offense", his failure to address either the content or effect of those warnings through the administrative remedies available to him has precluded any timely review by the agency. The appellant's underlying argument, that his termination should be deemed invalid on that basis, was not raised until some eleven months after his termination from employment. While the agency must be accountable for fair and equitable administration of the rules, it should not be penalized by virtue of the appellant's failure to properly plead his case or take a timely appeal from decisions of the appointing authority. For these reasons the Board finds that any remedy required herein must take these facts into consideration as a matter of equity. See, RSA 21-I:58, I.

On the evidence before it, the Board voted to grant Mr. Martel's appeal in part. In so doing, the Board ruled as follows on the Appellant's Requests for Findings of Fact and Rulings of Law:

1 - 5 are granted to the extent that they are consistent with the decision above.

6 - 7 are denied

8 is denied, as the appellant failed to offer any evidence supportive of such a conclusion.

9 is granted to the extent that it is consistent with the foregoing findings, and the reinstatement order below.

Mr. Martel shall be reinstated under the following conditions:

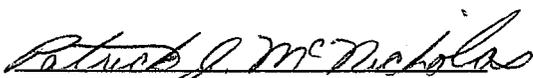
1. The letters of warning shall be corrected as follows:

- A. The November 10, 1992 letter of warning shall be revised by deleting the first paragraph and replacing it with the following: "Pursuant to the provisions of the Rules of the NH Division of Personnel, PART Per 1001.03, this is a written warning for exhibiting physically or verbally abusive behavior, and for violation of a posted or published agency policy, the Youth Services Center Abuse and Neglect Policy".
- B. The January 13, 1993 letter of warning shall be revised by deleting the first paragraph and replacing it with the following: "Pursuant to the provisions of the Rules of the NH Division of Personnel, PART Per 1001.03, this is a written warning for exhibiting uncooperative and disruptive behavior."
- C. The March 5, 1993 letter of warning shall be revised by deleting the first paragraph and replacing it with the following: "In accordance with the Rules of the Division of Personnel, Per 1001.03 and Per 1001.05, this is an official written warning and notice of suspension without pay for continually exhibiting uncooperative and disruptive behavior."
- D. The May 18, 1993 letter of warning shall be revised by deleting "and Notice of Dismissal" from the reference line, deleting the first paragraph, and replacing the first paragraph with the following: "In accordance with the Rules of the Division of Personnel, PART Per 1001.03, this is a written warning for exhibiting uncooperative and disruptive behavior, and for violation of a posted or published agency policy entitled 'Mechanical Restraint Policy'. This letter shall also be revised by deleting the second paragraph on page 2, and inserting the following in its place: "This is the fourth letter of warning you have received in the past five months for various offenses generally described as 'unsatisfactory work' performance. Per 1001.08 (e)(2) provides that an appointing authority shall be authorized to dismiss an employee pursuant to Per 1001.03 by issuance of a fifth written warning for different offenses within a period of 2 years. As such, should you receive another written warning for any offense before the first letter has expired as a basis for further discipline, you shall be immediately dismissed without further warning."
- E. The Board recognizes that, as it has reformed the referenced letters of warning the result is that three letters of warning for the same offense exist and have been given to Mr. Martel. The Board, on the facts of this case, will not permit Mr. Martel to be terminated on that basis because he did not have the notice of those specific and repeated common offenses from the letters which were actually given to him as contemplated by Per 1001.03 and Per 1001.08(e).
2. In consideration of the appellant's failure to timely file an appeal of the first three letters of warning, and in light of his failure to accurately plead the legal basis for his termination appeal by specifying the alleged violation of the Personnel Rules, the above-listed letters of warning shall remain in effect for a full two years of continuous employment. The period of time between Mr. Martel's dismissal from employment (May 18, 1993) and the date of the hearing (April 13, 1994) shall not count toward the expiration of those letters for the purpose of additional discipline, up to and including

termination.

3. Mr. Martel shall be reinstated without benefit of back-pay, insurance premium payment, compensation for costs incurred during the period of absence as a result of lapsed insurance, retirement system contributions or credit, or accrual of seniority credit or leave, for the period of time between the initial filing of his appeal (June 1, 1993) and the date of hearing (April 13, 1994). This particular order is made to implement the equitable adjustment discussed above at page 6. See, RSA 21-I:58, I. He shall be reinstated at the convenience of the agency, provided that such reinstatement shall occur not later than thirty (30) days from the date of this decision. The agency shall, at its discretion, reinstate him to a position on any shift which it considers appropriate, regardless of the appellant's preference for assignment.
4. Mr. Martel shall successfully complete any refresher courses in professionalism, policy implementation or task specific training which the agency deems appropriate in light of his extended absence. Failure to complete the training in a reasonable period of time shall be deemed a sufficient basis for further disciplinary action, up to and including termination from employment.
5. Should the appellant seek relief from the reinstatement order for the customary two week notice for any gainful employment in which he currently may be engaged, any such request shall be treated as a leave without pay and shall not be eligible for compensation of any kind from the agency.
6. Failure to report to duty as required, except as set forth in paragraph 5 above, shall constitute grounds for immediate dismissal and shall subject the employee to forfeiture of any relief which this order may have provided.
7. The appellant's absence shall be recorded on personnel action forms as a suspension without pay.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
Linda E. Chadbourne, SEA Legal Intern
Sandra Platt, Human Resources Administrator, Health and Human Services